(1)

91-172

No.

Supreme Court, U.S.
FILED
JUN 21 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MICHAEL MAGNANO,

Petitioner,

vs.

STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1.) Do the Sixth and Fourteenth Amendment of the United States Constitution mandate that a State Trial Court ascertain, by means of a colloquy on the record, that a citizen's waiver of his right to trial by jury as guaranteed by the Sixth Amendment to the Constitution is freely, knowingly and voluntarily made?

(2.) Did the acceptance of such a waiver without inquiry by the Trial Court to ascertain the voluntariness of that waiver, violate a citizen's right to due process as guaranteed to him by the Fifth Amendment of the Constitution of the United States?

(3.) Did the New York State Appellate Courts affirmance of the Petitioner's conviction without addressing the Constitutional issues involved, constitute a denial of the Petitioner's right to due process as guaranteed to him by the Fifth and Fourteenth Amendments of the Constitution of the United States?

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TEXTS

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IN THE SUPREME COURT OF THE
UNITED STATES
October Term 1991
No.

Michael Magnano, Petitioner,

v.

State of New York

PETITION FOR A WRIT OF CERTIORARI
TO NEW YORK STATE COURT OF APPEALS

TO: The Honorable Chief Justice and Associate Justices, of the Supreme Court of the United States:

Michael Magnano, the Petitioner herein, prays that a Writ of Certiorari issue to review the Judgment of the New York State Court of Appeals, entered in the above entitled case on April 25, 1991.

OPINION BELOW:

April 25, 1991, opinion of the New York State Court of Appeals whose Judgment herein is sought to be reviewed is reported at New York State Court of Appeals Slip Opinion, April 25, 1991 and is reprinted in the Appendix to this Petition at page 5.

JURISDICTION:

The Jurisdiction in this Court is invoked pursuant to Title 28 U.S.C. 1257(a).

> "Section 1275(a): State courts; appeal; certiorari
>
> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or

where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." U.S.C.A. Title 28 Section 1257(a), p.40 of pocket part supplement.

CONSTITUTIONAL PROVISIONS INVOLVED:

This case involves the Sixth Amendment of the Constitution of the United States which provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S.C.A. Const. Article 6, p. 38-39

The Fourteenth Amendment of the Constitution of the United States, Section 1 states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S.C.A. Const. Article 14, Section 1, p. 41.

The Fifth Amendment of the Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor

shall private property be taken for public use, without just compensation." U.S.C.A. Const. Article 5, page

STATEMENT OF THE CASE

On or about March 19, 1987, a Grand Jury in the County of Allegany, State of New York, returned Indictment No. 87-014 as against the Petitioner, Michael Magnano, charging him with: Offering a False Instrument for Filing in the First Degree, (New York Penal Law 175.35, 12 counts); Deviating from the terms for Prescription (New York Education Law 6816(1)(a), 15 counts); Misbranding a Drug (New York Education Law 6811(10), 15 counts); and Criminal Solicitation in the Fourth Degree (New York Penal Law 100.05, 1 count).

On or about February 29, 1988, Mr. Magnano was brought to trial in the County Court, County of Allegany, State of New York, Honorable Wayne A. Feening,

presiding. The prosecution was brought by the Deputy Attorney General for Medicaid Fraud Control.

On February 29, 1988, the Trial Court, without making any inquiry of the Defendant on the record to determine that the waiver was made knowingly, intelligently and voluntarily as those terms have been construed by the United States Supreme Court, accepted a written waiver of trial by jury and proceeded with a bench trial of the Indictment. The only colloquy had of the Petitioner by the Court, relative to the waiver of Petitioner's Constitutional right to a trial by jury is reflected in the Record, thus:

> "THE CLERK: Defendant and all counsel present, Your Honor.

THE COURT: Mr. Boreanaz, I would assume that our first order of business this morning should be the signing and consent to proceeding to trial without a jury by Mr. Magnano. Is that your position?

MR. BOREANAZ: Yes, Your Honor, may the record reflect that here in court is Mr. Magnano and in my presence has signed a written waiver which has been prepared, and I have likewise put my signature on the same document. With the permission of the Court I tender it to the Court.

THE COURT: Mr. Russell, do you have any objection to proceeding without a jury in this matter?

MR. RUSSELL: No, Your Honor.

THE COURT: All right, Mr. Magnano, you do acknowledge to me that you have signed the waiver of jury trial and agree that we can proceed on this matter without a jury trial?

MR. MAGNANO: Yes, Your Honor.

THE COURT: All right, let the record reflect that I will approve the waiver of trial by jury and allow it to be tried without a jury and sign the order

accordingly. Let's have it marked as Court's Exhibit 1.

(Court's Exhibit 1 marked for identification.)

THE COURT: All right, counsel, are there any other housekeeping-type requests or motions or otherwise at this time prior to starting the trial?" (Record on Appeal, p. 12)

At the conclusion of the trial, the Court found Mr. Magnano guilty on thirty-nine (39) of the forty-three (43) counts charged in the Indictment. The Court then sentenced Mr. Magnano to two indeterminate terms of two to four years on each of the eleven false filing counts, definitive terms of six months on each of the fourteen deviating from the terms of prescription counts, and a six month term on each of the fourteen misbranding counts, all sentences to run concurrently.

On or about May 26, 1988, Petitioner, Michael Magnano, by his attorney filed a Notice of Appeal, relative to the aforementioned Judgment of Conviction and Sentence. The Appeal was duly perfected before the Supreme Court of the State of New York, Appellate Division, Fourth Department. The Appellate Division, Fourth Department, on or about March 2, 1990, affirmed the conviction in a Memorandum Decision and entered an Order to that effect. (People v. Magnano, 158 A.D.2d 979.)

Subsequent to the aforementioned affirmance of his conviction, the Petitioner, Michael Magnano, made application before the New York State Court of Appeals for leave to Appeal.

Leave to Appeal was granted by Order of that Court dated June 5, 1990. The certified question posited to the Court on the application for leave was:

> "Does the failure of a Trial Court to make a proper inquiry on the record and ascertain that Defendant's waiver of his right to trial by jury is freely and voluntarily made, render that waiver a nullity and constitute reversible error?"

The Appeal was duly perfected and briefed before the New York State Court of Appeals. After hearing oral argument on or about March 19, 1991, the New York State Court of Appeals affirmed the conviction in a Memorandum Decision, issued without opinion and in reliance on the opinion of the Supreme Court Appellate Division, Fourth Department and entered an Order to that affect on

April 25, 1991.

The Petitioner, Michael Magnano, now petitions this Court for a Writ of Certiorari to the New York State Court of Appeals to review the propriety of that Court's failure to properly address the Federal Constitutional question raised.

REASONS FOR GRANTING THE WRIT

It is most respectfully submitted that this Court should grant the Petition and ultimately answer the questions posited in the affirmative. There can be no argument but that the Sixth Amendment to the United States Constitution guarantees every citizen a right to be tried by a jury of his peers.

The salient question raised by the Petitioner in the Courts below is what basic procedures must a State Trial Court follow in accepting a waiver of that fundamental, constitutional right. The New York State Court of Appeals has never addressed that specific question.

In the matter at bar, the Trial Court accepted a so-called form waiver

of the Petitioner's right to a trial by jury. The Trial Court made no effort to ascertain, on the Record, that the written waiver in question was made knowingly, intelligently, and voluntarily, as those words have had been construed by the United States Supreme Court. Any examination of the colloquy had between the Trial Court and the Petitioner in this regard, clearly demonstrates that upon accepting the waiver in question, the Court did not and could not have had any information before it to determine Mr. Magnano's state of mind, knowledge and understanding of the fundamental constitutional right to a jury trial which he was waiving nor for that matter, whether or not Mr. Magnano was

under the influence of drug, alcohol, threats, coercion, duress or any other of the myraid circumstances, which if present, would render the waiver in question involuntary and thus a legal nullity.

In the matter at bar, both the intermediate Appellate Court, as well as the New York State Court of Appeals, have impermissibly avoided addressing the fundamental constitutional issue. It is submitted that this Court should grant the Petition and address the issue.

It is, of course, well settled law, that under this Court's prior decisions a citizen may, in fact, waive his constitutional rights. Johnson v. Zerbst, 304 U.S. 458; Westbrook v.

Arizona, 384 U.S. 150; Farretta v. California, 422 U.S. 806; Patton v. U.S., 281 U.S. 276; however, it is submitted that implicit in this Court's prior decisions relative to the waiver of a constitutional right, is that the Court in accepting the waiver must make an inquiry and/or hold a colloquy with the defendant himself, before the Court can make a determination that a citizen is fully aware of the consequences of the choice he is making. It follows logically, that a State Trial Court's failure to so inquire renders the waiver a nullity and thus constitutes a denial of the citizen's constitutionally guaranteed right to a trial by jury under the Sixth Amendment of the Constitution of the United States.

This Court's attention is most respectfully drawn to its prior holding in Patton v. U.S., 281 U.S. 276. In Patton, supra, the duty of a Trial Court in accepting a waiver of a trial by jury is set forth thus:

> "Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity." Ibid. 281

U.S. 288.

It is submitted that it is implicit in the mandate of this Court's language in Patton, supra, that the Trial Court must make an inquiry and/or hold a colloquy with the defendant himself, before the Court can make a determination that the defendant is fully aware of the consequences of the choice that he is making. It follows logically that a Trial Court's failure to so inquire renders the waiver in question a nullity.

Concededly this Court's decision in Patton, supra, was rendered relative to the proper method of waiving a citizen's constitutional right to a jury trial under the Federal Rules. However, it is submitted that the situation in

Patton, supra, is clearly analogous to the situation at bar, despite the fact that under State law a prosecutor does not have to consent to the waiver as a prosecutor must under Federal law. But the fact remains, that a court cannot and should not accept a waiver of a fundamental constitutional right without properly ascertaining on the Record that the waiver in question is, in fact, voluntarily made. It is most respectfully submitted that this Court's consideration of the question and its ultimate decision construing the obligations of a State trial court and hopefully setting forth the proper procedure to be followed by a State trial court in accepting a waiver of a defendant's constitutional right to a

trial by jury would be extremely beneficial both to the bench and the bar. It is further submitted that this Court's resolution of the question would remove any doubt or uncertainty as to the proper procedure to be utilized by State trial courts and hopefully prevent any further controversy in this area.

In the matter at bar, it is submitted that the State Court's further denied to the Petitioner, Michael Magnano, the right to due process guaranteed to him by the Fifth Amendment of the United States Constitution and made applicable to the State Trial Courts by the Fourteenth Amendment of the United States Constitution. The Trial Court's acceptance of the waiver in question, without ascertaining on the

record that the waiver was based on a voluntary intelligent and knowing consent, and the affirmance of the resultant conviction without addressing the Constitutional issue by the intermediate Appellate Court, and by the New York State Court of Appeals, in fact, deprived Mr. Magnano of his liberty without affording him the due process guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution.

Any argument that the New York State Appellate Court's affirmance of the conviction in question was properly had is entirely without merit. It is suggested to this Court that the State Appellate Court's refusal to address the Constitutional issues raised on Appeal

on the grounds that those issues had not been preserved for Appeal at the trial level constituted an impermissible avoidance of the fundamental constitutional question involved. That question, of course, was and is the propriety of a State Trial Court's acceptance of the waiver of a citizen's constitutionally guaranteed right to a trial by jury without ascertaining on the record that the waiver in question is made knowingly, intelligently and voluntarily as prescribed by the decisions of the United States Supreme Court.

The issue of the acceptance of the waiver in violation of the Petitioner's constitutional right to a trial by jury, was raised by the Petitioner on Appeal

to the New York State Supreme Court, Appellate Division, Fourth Department. That Court in affirming the conviction, refused to address the Constitutional question raised by the Petitioner. The Petitioner, by his attorney, then made application for Leave to Appeal to the New York State Court of Appeals. This application was based both on the Constitutional issues, as well as the lower Appellate Court's failure to address these issues. The application for Leave to Appeal was properly granted. The Constitutional issues properly before the New York State Court of Appeals were thoroughly briefed and argued by the parties. Additionally, the propriety of the issues being before the New York State Court of Appeals,

based on the fundamental constitutional questions posited and the lower Appellate Court's failure to address them, were also briefed before the New York State Court of Appeals. On oral argument before that body, members of the Court questioned both parties relative to these constitutional issues. At no time during the oral argument did any member of the Court ever raise the question of that Court's jurisdiction to determine the constitutional questions presented, nor was any so-called preservation issue raised by any member of that Court. Despite the foregoing, the New York State Court of Appeals chose to completely ignore the constitutional arguments before it and affirmed the conviction based on the

opinion at the Appellate Division, Fourth Department. It is submitted that in this matter, the New York State Court of Appeals improperly avoided deciding the constitutional issue which was properly before it.

Apparently the New York State Court of Appeals refusal to address the constitutional issue before it, in the matter at bar, was grounded on the fact that no objection was raised at the trial level and therefore the error had not been preserved for consideration either on direct appeal to the Appellate Division or in the New York State Court of Appeals. Initially, it must be pointed out that there was no possible way for the Petitioner to preserve the issue at the trial level in this matter.

The error complained of was and is, the State Trial Court's failure in its duty to properly ascertain on the record that the waiver in question was made knowingly, intelligently and voluntarily. It is most respectfully submitted that the New York State Court of Appeals may properly review on Appeal, errors of the Trial Court, even though the point was not raised and preserved by objection when the error is of such a fundamental constitutional nature as in the matter at bar.

This Court's attention is most respectfully drawn to the language utilized by the commentator in, Powers of the New York Court of Appeals, Cohen and Karger, revised edition. This learned treatise on the powers of the

New York Court of Appeals, is a long recognized authority and this Court might note that it is frequently relied on by the New York State Court of Appeals as authority in determining the jurisdiction of that Court. In addressing the New York State Court of Appeals power to address constitutional questions such as the one at bar, the commentator in Cohen and Karger, supra, utilized the following language:

> "There are, however, exceptional situations in which claimed errors of the trial court may be reviewed on appeal even though the point was not raised by objection in the trial court. The underlying principle was announced in the early case of People v. Bradner:
>
> If the record discloses upon its face that the court had no jurisdiction, or that the constitutional method of trial by jury was disregarded..., or some other defect in the proceedings,

which could not be waived or cured and is fundamental, it would, as we conceive, be the duty of an appellate tribunal to reverse the proceedings and conviction, although the question had not been formally raised in the court below, and was not presented by any ruling or exception on the trial.

In accordance with that reasoning, the Court of Appeals has reviewed on appeal, though the point was not formally raised in the trial court, such questions as the denial of an adequate opportunity to the defendant to prepare for trial with the assistance of counsel of his own choice, the failure of the trial judge to charge the jury, the failure of the prosecuting attorney to make an opening statement to the jury, the failure of the court to ask whether he had any legal cause to show why judgment should not be pronounced against him, and the power of the trial court to amend the indictment by adding a new count." (footnotes omitted) Cohen & Karger, revised ed., at 750-751, section 199.

That the fundamental constitutional issue was the proper

subject for consideration by the New York State Court of Appeals is further clearly exemplified by the prior decisions of that Court. The New York State Court of Appeals has traditionally so held in a variety of factual situations, People v. Bradner, 107 N.Y. 1 (jurisdiction of a trial court); People v. Miles, 289 N.Y. 360 (waiver of right to be tried by indictment returned by a grand jury waived by defendant's counsel); People v. ex. rel. Battista v. Christian, 249 N.Y. 314 (waiver of indictment and plea to an information charging a capital crime); People v. McLucas, 15 N.Y.2d 167 (court's improper reference to a defendant's failure to testify); Cancemi v. People, 18 N.Y. 128 (waiver of right to trial by 12

jurors); People v. Patterson, 39 N.Y.2d 288 (shifting of burden of proof to defendant); People v. Michael, 48 N.Y.2d 1 (double jeopardy); People v. Thomas, 50 N.Y.2d 467 (charge to jury shifting burden of proof to defendant); and People v. Lopez, 71 N.Y.2d 662 (failure of trial court to make a proper inquiry when accepting a guilty plea).

It is most respectfully submitted that in light of the New York State Court of Appeals prior decisions as noted supra, it was clearly improper for that body to avoid deciding the fundamental constitutional issue raised in the matter at bar.

It is most respectfully submitted that this Court should grant the Petition so that it can address not only

the issue of the acceptance of such a waiver, but equally importantly, this Court should address the question of the propriety of the New York State Court of Appeals avoidance of the fundamental constitutional issues in such a manner. It is most respectfully suggested that this Court should rule and declare once and for all that the highest Appellate Court of a State may not deprive a citizen of the right to due process guaranteed to him by the Fifth Amendment of United States Constitution and made applicable to the States by the Fourteenth Amendment to the United States Constitution by avoiding that question on State procedural grounds.

CONCLUSION

It is most respectfully submitted that in light of the foregoing, this Court should grant the Petition and issue a Writ of Certiorari to the New York State Court of Appeals.

DATED: June 13, 1991

Respectfully submitted,

LAW OFFICES OF GARY GREENWALD
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P.O. Box 299
Goshen, New York 10924

GARY GREENWALD, ESQ.
of Counsel

No.
IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1990
Michael Magnano, Petitioner

v.

State of New York
ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS
PETITION FOR WRIT OF CERTIORARI

PETITIONER'S APPENDIX

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COURT OF APPEALS
STATE OF NEW YORK

The Hon. Sol Wachtler, Chief Judge, Presiding
No. 55

The People & c.,

Respondent,

v.

Michael Magnano,

Appellant.

The appellant in the above entitled appeal appeared by Gary Greenwald, Esq. the respondent appeared by Hon. Edward J. Kuriansky, Special Attorney General, Medicaid.

The Court, after due deliberation, orders and adjudges that the order is affirmed for the reasons stated in the memorandum at the Appellate Division (158 AD2d 979). Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone, Hancock and Bellacosa concur.

The Court further orders that this record of the proceedings in this Court be remitted to the Allegany County Court there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

_____

Donald M. Sheraw, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, April 25, 1991

JUDGMENT

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

1997

PRESENT: DILLON, P.J., CALLAHAN, BOOMER, PINE, BALIO, JJ.

PEOPLE OF THE STATE OF NEW YORK,
RESPONDENT,

V

MICHAEL MAGNANO, APPELLANT.

The above named Michael Magnano having appealed to this court from the judgment of the Allegany County Court, entered in the Allegany County Clerk's office on May 4, 1988, and said appeal having been argued by Gary Greenwald of counsel for appellant, Donald Zuckerman of counsel for respondent, and due deliberation having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be and the same hereby is unanimously affirmed.

Memorandum, which is hereby made a part hereof.

Entered: February 2, 1990 CARL M. DARNALL, Acting Clerk

SUPREME COURT)
APPELLATE DIVISION)
Fourth Judicial Department)

I, CARL M. DARNALL, Acting Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, below on file in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this FEB 2, 1990.

Acting Clerk

158 N.Y.A.D.2d 297

19917. (Allegany Co.) -- PEOPLE OF THE STATE OF NEW YORK, V MICHAEL MAGNANO, APPELLANT -- Judgment unanimously affirmed. Memorandum: The waiver of jury trial signed by defendant and his attorney, and approved by the Judge, states that it was executed "in open court before the undersigned Judge". No assertion by defendant to the contrary is found in the record. Thus, defendant's claim of error with respect to the procedure followed in approving the waiver is not preserved for review (see, CPL 470.05[2]; see, People v. Johnson, 51 NY2d 986; People v. Sierra, 143 AD2d 1065, appeal denied 73 NY2d 926). Moreover, there is nothing in the record which would have alerted the court to the possibility that defendant was not fully aware of the consequences of the waiver (see, CPL 320.10[2]; People v. Burnett, 136 AD2d 888, lv denied 70 NY2d 1004). Any claim by defendant "that his participation in the waiver was not knowing and voluntary implicates his relationship with his trial attorney and is to be proved, if at all, by facts outside the trial record in a proceeding maintainable under CPL 440.10" (People v. Johnson, supra, at 988; see also, People v. Davidson, 136 AD2d 66). (Appeal from Judgment of Allegany County Court, Feeman, J. - Offering False Instrument For Filing, 1st Degree.) PRESENT: DILLON, P.J., CALLAHAN, BOOMER, PINE, BALIO, JJ.

February 28, 1990

The Honorable Sol Wachtler
Chief Judge
Court of Appeals
State of New York
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207-1095

RE: The People of the State of New York, Respondent, against Michael Magnano, Appellant.

Honorable Judge Wachtler:

The above named Defendant/ Appellant, hereby respectfully prays for the issuance of a certificate pursuant to Section 60.20 of the Criminal Procedure Law of the State of New York, granting permission to Appeal and certifying that there is a question of law in the above entitled cause which ought to be reviewed by the Court of Appeals and allowing an Appeal to the said court from the Order of the Appellate Division, Fourth Department, entered on the 2nd day of February, 1990, affirming the Judgment of the County Court in Allegany County, entered on the 4th day of May, 1988, convicting the Appellant of the crimes of Offering

a False Instrument for Filing in the First Degree, (P.L. Section 175.35) [11 counts], Deviating from the Terms of a Prescription (Ed. L. Section 6816 [1]a) [14 counts] and Misbranding a Drug (Ed. L. Section 6811 [10]]) [14 counts] and from each and every part of said Order.

The question which should be certified before this Court is:

> "Does the failure of a trial court to make a proper inquiry on the record and ascertain that a defendant's waiver of his right to a trial by jury is freely and voluntarily made, render that waiver a nullity and constitute reversible error."

It is most respectfully submitted, as demonstrated in the Memorandum in Support submitted with this application, that the answer should be in the affirmative.

The question of this Court's jurisdiction to hear the appeal in this matter has been addressed in the aforementioned Memorandum in Support. Based on the argument set forth in the supporting Memorandum, it is most respectfully submitted that this Court does have the jurisdiction to entertain the instant Appeal.

The Appellant, Michael Magnano, was admitted to bail pursuant to an

Order of the Honorable John H. Doerr, on or about December 22, 1988, pending the determination of the Appeal by the Appellate Division, Fourth Department. It is requested that this Court continue Mr. Magnano on bail relative to this conviction pending the determination of the instant application. This Court is advised that despite having been admitted to bail relative to this conviction, Mr. Magnano is currently incarcerated in the Cattaraugus County jail as a result of a conviction for Criminal Sale of a Controlled Substance, in the Second Degree (P.L. 220.41). Subsequent to the conviction in that matter and prior to sentencing, Mr. Magnano, by his attorney, moved pursuant to C.P.L. 330.30 to set aside the verdict in that matter. The motion to vacate is presently before the Cattaraugus County Court (Dadd J.) and has not yet been determined as of this writing. Mr. Donald H. Zuckerman, the Special Assistant Attorney Attorney General, who prosecuted the Appeal in the Fourth Department, has agreed orally not to oppose Mr. Magnano being continued on bail pending the determination of this application with the proviso, that this Court be advised of Mr. Magnano's current status relative to the charges in Cattaraugus County.

It is most respectfully requested that oral argument be scheduled relative to this instant application for leave to appeal at this Court's convenience.

No previous application for leave to Appeal has been made in this matter before either this Court or the Appellate Division, Fourth Department.

Respectfully submitted,

Law Offices of Gary Greenwald
GARY GREENWALD, ESQ.

GG/lv

c.c.: Donald Zuckerman, Esq.
Special Assistant
Attorney General
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270 Broadway
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COURT OF APPEALS OF THE
STATE OF NEW YORK

----------X

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

-against-

MICHAEL MAGNANO,

Appellant.

----------X

MEMORANDUM IN SUPPORT OF THE APPLICATION FOR LEAVE TO APPEAL

Respectfully submitted,

LAW OFFICES OF GARY GREENWALD
Attorney for Appellant
252 Main Street, Suite 204
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GARY GREENWALD, ESQ.
of Counsel

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PROCEDURAL HISTORY

On or about March 19, 1987, a grand jury in the County of Allegany returned Indictment Number 87-014, as against Michael Magnano, charging him with Offering a False Instrument for Filing in the First Degree (P.L. 175.35, 12 counts), Deviating from the Terms for Prescription (Ed.L. 6816[1]a 15 counts), Misbranding a Drug (Ed.L. 6811 [10], 15 counts) and Criminal Solicitation in the Fourth Degree (P.L. 100.05, 1 count).

On or about February 29, 1988, Mr. Magnano was brought to trial in the County Court, County of Allegany, Honorable Wayne A. Feeny presiding. The prosecution was brought by the Deputy

Attorney General for Medicaid Fraud Control.

On February 29, 1988, the trial court, without making proper inquiry of the Defendant on the record, accepted a written waiver of trial by jury and proceeded with a bench trial of the Indictment. The only colloquy had of the Appellant by the Court, relative to the waiver of his constitutional right to a trial by jury is reflected in the record thus:

> "THE CLERK: Defendant and all counsel present, Your Honor.
>
> THE COURT: Mr. Boreanaz, I would assume that our first order of business this morning should be the signing and consent to proceeding to trial without a jury by Mr. Magnano. Is that your position?
>
> MR. BOREANAZ: Yes, Your Honor, may the record reflect that here in court is Mr. Magnano and in my

presence has signed a written waiver which has been prepared, and I have likewise put my signature on the same document. With the permission of the Court I tender it to the Court.

THE COURT: Mr. Russell, do you have any objection to proceeding without a jury in this matter?

MR. RUSSELL: No, Your Honor.

THE COURT: All right, Mr. Magnano, you do acknowledge to me that you have signed the waiver of jury trial and agree that we can proceed on this matter without a jury trial?

MR. MAGNANO: Yes, Your Honor.

THE COURT: All right, let the record reflect that I will approve the waiver of trial by jury and allow it to be tried without a jury and sign the order accordingly. Let's have it marked as Court's Exhibit 1.

(Court's Exhibit 1 marked for identification.)

THE COURT: All right, counsel, are there any other housekeeping-type requests or motions or otherwise at this time

prior to starting the trial?"

At the conclusion of the trial, the Court found Mr. Magnano guilty on 39 of the 43 counts charged against him. The Court then sentenced Mr. Magnano to indeterminate terms of 2 to 4 years on each of the 11 False Filing counts, definitive terms of 6 months on each of the 14 Deviating from the Terms of Prescription counts, and a 6 month term on each of the 14 Misbranding counts, all sentences to run concurrently.

On or about May 26, 1988, Michael Magnano, by his attorney filed a Notice of Appeal relative to the aforementioned Judgment of conviction and sentence. The Appeal was duly perfected before the Supreme Court of the State of New York,

Appellate Division, Fourth Department. The matter was briefed by Gary Greenwald, Esq., for the Defendant/Appellant and Donald H. Zuckerman, Special Assistant Attorney General on behalf of the People. Subsequent to the oral argument, with the permission of the Appellate Court, the attorney for the Appellant submitted a supplemental Brief in letter form distinguishing People v. Johnson, 51 N.Y.2d 986. After hearing oral argument by the aforementioned attorneys, the Appellate Division, Fourth Department, on or about March 2, 1990, in a Memorandum Decision, affirmed the conviction and entered an Order to that effect. In affirming the conviction, the Fourth Department held:

"No assertion by defendant to the contrary is found in the record. Thus, defendant's claim of error with respect to the procedure followed in approving waiver is not preserved for review." (citations omitted)

The Appellant, by his attorney, asserts that the aforementioned Decision and Order of the Appellate Division, Fourth Department was error and makes application to this Court for leave to appeal.

POINT I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR

It is most respectfully urged, that the issue raised by the instant Appeal, has never been specifically addressed by this Court. The language of Criminal Procedure Law 320.10 mandates that the trial court approve the execution and submission of such a waiver unless the court determines "...that the defendant is not fully aware of the consequences of the choice he is making." Unfortunately, the statute is silent as to the proper procedure which should be utilized by the trial court in making the decision. It is submitted, however, that implicit in the mandate of the statute is that the court must make an inquiry and/or

hold a colloquy with the defendant himself, before the court can make a determination that the defendant is fully aware of the consequences of the choice he is making. It follows logically that a trial court's failure to so inquire renders the waiver a nullity and thus constitutes reversible error. It is most respectfully submitted that this Court's consideration of the question and its ultimate decision construing the statute and hopefully setting forth the proper procedure to be followed by a trial court in accepting the waiver of a defendant's constitutional right to trial by jury would be extremely beneficial, both to the bench and bar. It is submitted that this Court's

resolution of the question would remove any doubt or uncertainty as to the proper procedure to be utilized and hopefully prevent further controversy in this area.

It is submitted that the Appellate Court erroneously did not address the issue properly raised by the Appellant before it. The Appellate Court, relying on a misapplication of this Court's Memorandum Decision in People v. Johnson, 51 N.Y.2d 986, held that the issue of the trial court's failure to ascertain on the record that the Appellant's waiver of his right to a trial by jury had not been preserved by a timely objection; the issue was not preserved for appellate review and therefore, the only remedy available to

the Appellant was to bring a motion pursuant to C.P.L. 440. It is suggested to this Court that the factual situation in Johnson, supra, was distinguishable from the matter at bar and the reasoning of this Court in that matter is not applicable. In Johnson, supra, it is clear that the Appellant was urging the court to hold that he had been provided ineffectual assistance of counsel relative to the waiver in question in that matter. This Court held that such ineffectual assistance could only be demonstrated by matters which had occurred dehors the record and therefore, the Appellant was limited to seeking relief via C.P.L. 440. The Appellant at bar, did not, in any fashion, raise the claim of ineffectual

assistance of counsel before the Appellate Court. The Appellant made no claim that any matter whatsoever, dehors the record, constituted the basis of his complaint. In the matter at bar, the Appellant claimed, argues and continues to argue before this Court that the error he complains of is ascribed to the trial Court and consists of the trial Court's failure to comply with the obvious mandate of C.P.L. 320.10. It is and has been the Appellant's position, that C.P.L. 320.10 mandates that the trial Court must demonstrate on the record, by means of a colloquy with the Defendant, not the Defendant's attorney, that the Defendant is making a knowing and voluntary waiver of one of his most fundamental constitutional rights, i.e.,

his right to be tried by a jury of his peers. It is submitted that absent such a colloquy, the court cannot properly accept the waiver in question and the absence of any effort on the court to so ascertain on the record, constitutes reversible error.

It is submitted that this Court should grant leave in the instant matter so that it may clearly and unequivocally set forth the specific duties of a trial court when accepting a waiver pursuant to C.P.L. 320.10.

In reaching its determination in this matter, it is urged that this Court should look to its prior decisions when determining the criteria which must be met before a court may accept a waiver of a fundamental constitutional right

in analogous situations such as the waiver of the right to counsel at trial and the waiver of a jury trial made by a defendant when entering a guilty plea.

This Court's attention is most respectfully drawn to the language utilized by it in People v. Duchin, 12 N.Y.2d 351, where, while interpreting what constitutes a valid waiver, it was held:

> "An accused who admits his guilt, and does so with full appreciation of his act, may not be compelled to stand trial against his will. And, if this be so, certainly, a defendant may not be forced to a trial before a jury if it sufficiently appears that his election to be tried without one was made knowingly and understandingly, based on an intelligent, informed judgment." ibid., supra, p. 353.

In People ex rel. Rohrlich v. Follette, 20 N.Y.2d 297, this Court

again emphasized the necessity of a voluntary, knowing and intelligent waiver relative to a defendant's right to trial by jury, where it was stated:

> "...We have been scrupulous in enforcing compliance with the waiver provisions in those cases in which waiver is permissible. (See People v. Ryan, 19 N.Y.2d 100.)" 20 N.Y.2d. 297, at 300.

The Court in Rohrlich, supra, stated further:

> "Since the passage of the amendment the rule which has evolved from the cases is that the requirement of judicial approval is designed to insure that the defendant's waiver is a knowing and intelligent one and that the discretion of the Trial Judge to deny a defendant's request to waive a jury trial is limited to those cases in which some "compelling ground arising out of the attainment of the ends of justice" requires that the request be denied." Ibid. p. 300.

Any doubt as to the necessity of

applying constitutional standards to a waiver in this context is dispelled by the language utilized by Chief Judge Wachtler writing for the Court in People v. Parker, 57 N.Y.2d 136. Although in that matter Judge Wachtler was addressing the issue of a defendant's waiver of his right to be present at trial, the principle enunciated is clearly depositive of the question at bar. In Parker, supra, Judge Wachtler stated:

> "Although the right to be present at a criminal trial may be waived, the right is of a fundamental constitutional nature and therefore the validity of any waiver including one which could be implied, must be tested according to constitutional standards. Thus, in People v. Epps, 37 N.Y.2d, supra, at p. 350, 372 N.Y.S.2d 606, 334 N.E.2d 566 we noted that the key issue was whether this defendant

knowingly, voluntarily and intelligently relinquished his known right (Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461)."

It is submitted that an analogy can and should be drawn between a defendant waiving his fundamental right to trial by jury with that of a defendant waiving his right to be represented by an attorney during the course of a trial. This Court has stressed the necessity of inquiry by a trial court to determine the validity of such a waiver. In People v. Reason, 37 N.Y.2d 351, the Court, relying on United States Supreme Court's decision in Faretta v. California, 422 U.S. 806 and Westbrook v. Arizona, 384 U.S. 150, as well as their own prior decision in People v. McIntyre, 36 N.Y.2d 10, the

Court held:

> "Although petitioner received a hearing on the issue of his competence to stand trial, there appears to have been no hearing or inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel and proceed, as he did, to conduct his own defense. "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused -whose life or liberty is at stake- is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." Johnson v. Zerbst, 304 U.S. 458, 465, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461; Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70."

This is the essential and appropriate inquiry which the Court must make before accepting a waiver of a fundamental

constitutional right.

Again, in People v. Sawyer, 57 N.Y.2d 12, this Court stressed the necessity for judicial inquiry in this regard:

> "At the root of the rule calling for special inquiry before a defendant may proceed pro se is recognition that implicit in a defendant's exercise of the right to do so is a concomitant right to forego the advantages of counsel (Faretta v. California, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562). To make sure this is well understood, more is required than that the right be "unequivocally and timely asserted". Substantively, it must be "knowing and intelligent" as well. (People v. McIntyre, 36 N.Y.2d 10, 17, 364 N.Y.S.2d 837, 324 N.E.2d 322). To ascertain that it is, the court should undertake a sufficiently "searching inquiry" of the defendant to be reasonably certain that the "dangers and disadvantages" of giving up the fundamental right to counsel have been impressed on the defendant (see Faretta v. California, 422

> U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562, supra; People v. White, 56 N.Y.2d 110, 117, 451 N.Y.S.2d 57, 436 N.E.2d 507). Appropriate "colloquy on the record between the judge and defendant' will not only test the defendant's understanding, but provide an objective basis for review (United States v. Bailey, 675 F.2d 1292 (D.C.Cir. 1982); see United States v. Dujanovic, 486 F.2d 182 (9th Cir.); United States v. Plattner, 330 F.2d 271 (2nd Cir.))." 453 N.Y.S.2d 418 at 423.

It cannot be controverted that this Court has, in a long line of cases, held unequivocally that upon accepting a guilty plea, the trial court must conduct an allocution. During that allocution, the court must ascertain to its own satisfaction, that the plea and resultant waiver of a trial by jury is being made knowingly and voluntarily by the defendant. Further, the defendant must acknowledge his guilt by allocuting

facts which demonstrate his guilt of the crimes charged. It is axiomatic that this allocution must be had of the defendant, even though he is represented by an attorney who is present at his side. The trial court cannot assume that because the defendant is "represented" that the plea and resultant waiver is being made intelligently, knowingly, freely and voluntarily. The trial court must ascertain this on the record from the defendant himself, not through his attorney.

This Court's attention is most respectfully drawn to its recent decision in People v. Lopez, 71 N.Y.2d 664, in which this Court reiterated and set forth once again the trial court's

duty, relative to accepting a guilty plea, and further, holding that on the Court's failure to properly do so, the defendant may challenge the sufficiency of the allocution on a direct appeal notwithstanding that a formal post allocution motion was not made. In Lopez, supra, the court stated:

> "In the rare case, however, where the defendant's recitation of the facts underlying the crime pleaded to clearly cast significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea, we have held that the trial court has a duty to inquire further to ensure that defendant's guilty plea is knowing and voluntary (see, People v. Francis, 38 N.Y.2d 150, 153, 379 N.Y.S.2d 21, 341 N.E.2d 540; People v. Beasley, 25 N.Y.2d 483, 487-488, 307 N.Y.S.2d 39, 255 N.E.2d 239; People v. Serrano, 15 N.Y.2d 304, 309, 258 N.Y.S.2d 386, 206 N.E.2d 330; see generally, People v. Harris, 61 N.Y.2d 9, 471 N.Y.S.2d

61, 459 N.E.2d 170). Thus, where a defendant's factual recitation negates an essential element of the crime pleaded to, the court may not accept the plea without making further inquiry to ensure that defendant understands the nature of the charge and that the plea is intelligently entered (see, People v. Beasley, 25 N.Y.2d 483, 307 N.Y.S.2d 39, 255 N.E.2d 239, supra [factual recitation appeared to negate essential element and evidence showed defendant may not have understood nature of charge]; People v. Serrano, 15 N.Y.2d 304, 258 N.Y.S.2d 386, 206 N.E.2d 330, supra, [factual recitation negated essential element]). Where the court fails in this duty and accepts the plea without further inquiry, the defendant may challenge the sufficiency of the allocution on direct appeal, not-withstanding that a formal postallocution motion was not made (People v. Beasley, 25 N.Y.2d 483, 307 N.Y.S.2d 39, 255 N.E.2d 239, supra, People v. Serrano, 15 N.Y.2d 304, 258 N.Y.S.2d 386, 206 N.E.2d 330, supra). In such cases, the court's attention should have been instantly drawn to the problem, and the salutary purpose of the preservation rule is arguably not jeopardized."

ibid., 71 N.Y.2d 662, at 666-667.

This Court is urged to note, that although the rule is somewhat different in the federal courts, insofar as the prosecutor must consent to a waiver of trial by jury, still our federal courts require the trial court to ascertain that the waiver of a jury trial is made freely, voluntarily and knowingly. Instructive in this regard, is the holding of the United States Supreme Court in Patton v. U.S. 281 U.S. 276, where the duty of a trial court in accepting a waiver of a trial by jury is set forth:

> "Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such

importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity." ibid., 85 S.Ct. 783, at 789.

In U.S. v. Delgado, 635 F.2d 889 (7th Circuit 1981), the Appellate Court noted:

"In United States v. Scott, 538 F.2d 362 (7th Cir. 1978), we adopted a supervisory rule governing trial court acceptance of a jury trial waiver. Before the district court accepts the waiver, the court must interrogate the defendant "to ensure that [the defendant] understands his right to a jury

trial and the consequences of waiver." ibid., 635 F.2d at 890.

The Court in Delgado, supra, then went on to spell out the type of dialogue which should take place between the trial court and the defendant so that a proper record may be had to determine if, in fact, the purported waiver was made knowingly and voluntarily:

> "The Scott opinion did not specify the questions that should be addressed to the defendant; rather, we advised the district courts to adopt some type of formal jury waiver inquiry. We take this opportunity to advise the trial courts that they should explain that a jury is composed of twelve members of the community, that the defendant may participate in the selection of jurors, and that the verdict of the jury is unanimous. The court should inform the defendant that if he waives a jury, the judge alone will decide guilt or innocence. After informing the

> defendant of these factors, the trial court should then ascertain whether the defendant wishes to waive his right to a jury trial. Only after this type of inquiry will the court be able to determine that the defendant understands his right to a jury trial and the consequences of waiver." 635 F.2d at 890 (7th Cir. 1981).

Similar reasoning was followed by other federal courts in United States v. Anderson, 704 F.2d 117 (3rd Cir.), United States v. Cochran, 770 F.2d 850 (9th Cir.), and United States v. Reyes, 603 F.2d 69 (9th Cir.).

It is submitted that any argument that the court's duty is satisfied by a representation by an attorney on the record, as in the matter at bar, that the defendant is waiving his right to a jury trial, is clearly refuted by the decision of this Court in People v.

Ryan, 19 N.Y.2d 100, where it was stated unequivocally:

> "The consent given by the defendant's counsel, in the case at bar, did not satisfy the constitutional requirements for waiver and, therefore, no waiver occurred. " ibid., 19 N.Y.2d 100 at p. 106.

In sum, this Court is most respectfully urged that it should grant the instant application for leave to appeal to this Court. Further, when deciding that Appeal, the Court should hold firmly and unequivocally that a proper construction of the language of C.P.L. 320.10 mandates that the trial court conduct a colloquy or inquiry of the defendant who is purportedly waiving his right to a trial by jury. Trial courts should be instructed to ascertain on the record, that that waiver is being

made, knowingly, intelligently, freely and voluntarily and that then and only then may the trial court properly make a decision to accept or deny that waiver.

POINT II. THE COURT OF APPEALS HAS JURISDICTION TO ENTERTAIN THE INSTANT APPEAL

It is most respectfully submitted that this Court does, in fact, have the jurisdiction to entertain the instant Appeal. It is urged that the question at bar clearly falls within the exception to C.P.L. 470.05 insofar as the error complained of is so fundamental that it did, in fact, effect the organization of the court and/or the mode of pleadings prescribed by law, as exemplified by this Court's Decisions in a long line of cases.

It cannot be controverted, that a citizen who is a subject of a felony Indictment, has a constitutional right to trial by jury both under Article 1, Section 2 of the New York State

Constitution, as well as the United States Constitution. It is submitted that in the matter at bar, the trial Court's error, in accepting a waiver without making a proper inquiry and reaching a conclusion on the record, that the waiver in question was made knowingly, willingly and voluntarily, is such fundamental constitutional error as to be reviewable by this Court, despite the absence of preservation of that error at the trial level.

It is most respectfully submitted that this Court's own prior decisions, make readily clear that this Court has the power to review such error. This Court has traditionally so held in a variety of factual situations. People v. Bradner, 107 N.Y. 1; People v.

Myles, 289 N.Y. 360, People ex. rel. Battista v. Christian, 249 N.Y. 314, People v. McLucas, 15 N.Y.2d 167, Cancemi v. People, 18 N.Y. 128, People v. Patterson, 39 N.Y.2d 288, People v. Michael 48 N.Y.2d 1, People v. Thomas, 50 N.Y.2d 467, People v. Lopez, 71 N.Y.2d 662.

This Court's attention is most respectfully drawn to the language utilized by this Court in analyzing the exception to the requirement of a timely objection in People v. Patterson, supra. The court held:

> "There is one very narrow exception to the requirement of a timely objection. A defendant in a criminal case cannot waive, or even consent to, error that would affect the organization of the court or the mode of proceedings prescribed by law. (Cancemi v. People, 18 N.Y. 128, 138; People v. ex rel. Battista v. Christian,

249 N.Y. 314, 319, 164 N.E. 111, 113.) In Cancemi, it was held that a defendant could not consent to being tried by a jury of less than 12 members. In People v. ex rel. Battista v. Christian supra, the court ruled that an information charging a defendant with an "infamous" crime was a nullity, despite defendant's consent, where the State Constitution provided that infamous crimes could be prosecuted only by Grand Jury indictment. Thus, the rule has come down to us that where the court had no jurisdiction, or where the right to trial by jury was disregarded, or where there was a fundamental, nonwaivable defect in the mode of procedure, then an appellate court must reverse, even though the question was not formally raised below. (People v. Bradner, 107 N.Y. 1, 4-5, 13 N.E. 87, 88; see People v. Miles, 289 N.Y. 360, 363-364, 45 N.E.2d 910, 912.)

This traditionally limited exception has, on occasion, been given broader expression. In People v. McLucas, 15 N.Y.2d 167, 256 N.Y.S.2d 799, 204 N.E.2d at p. 848.) Since the defendant's right against self incrimination had been violated, the judgment of conviction was reversed.

> As we view it today, the purpose of this narrow, historical exception is to ensure that criminal trials are conducted in accordance with the mode of procedure mandated by Constitution and statute. Where the procedure adopted by the court below is at a basic variance with the mandate of law, the entire trial is irreparably tainted. As we stated nearly 50 years ago, "prosecutions must be conducted in substance and without essential change as the Constitution commands." (People v. ex rel. Battista v. Christian, 249 N.Y. 314, 319, 164 N.E. 111, 112, **supra**.)" **ibid.**, 39 N.Y.2d 288, at 295-296.

In sum, it is submitted, that under this Court's own precedents as set forth **supra**, this Court clearly has the jurisdiction to entertain the instant Appeal and decide the question at bar.

CONCLUSION

It is most respectfully urged that the this Court should grant the instant application for leave to appeal and address the questions posited.

Respectfully submitted,

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Attorney for Appellant
252 Main Street, Suite 204
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GARY GREENWALD
of Counsel

ORDER GRANTING LEAVE

STATE OF NEW YORK

COURT OF APPEALS

BEFORE: HON. VITO J. TITONE
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

-against-

ORDER GRANTING LEAVE

MICHAEL MAGNANO,

Appellant.

I, VITO J. TITONE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that in the record and proceedings herein* questions of law are involved which ought to be reviewed by the Court of Appeals and

pursuant to Section 460.20 of the Criminal Procedure Law, it is therefore

ORDERED that permission be and it is hereby granted to the above-named appellant to appeal to the Court of Appeals.

DATED: at Albany, New York
June 5, 1990

_____
Associate Judge

Description: Order of the Appellate Division, of Order Fourth Department, entered February 2, 1990, affirming a judgment of the Allegany County Court, entered May 4, 1988.

To be orally argued by
Gary Greenwald.
Time requested: 20 minutes

COURT OF APPEALS OF THE STATE
OF NEW YORK

----------x

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

-against-

MICHAEL MAGNANO,

Appellant.

----------x

APPELLANT'S BRIEF

Respectfully submitted,

LAW OFFICES OF GARY GREENWALD
Attorney for Appellant
252 Main Street, Suite 204
P.O. Box 299
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GARY GREENWALD, ESQ.
of Counsel

"...Freedom of religion; freedom of the press, and freedom of person under the protection of the **habeas corpus**, and trial by juries impartially selected. These principles form the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation. The wisdom of our sages and the blood of our heroes have been devoted to their attainment. They should be the creed of our political faith, the text of civil instruction, the touchstone by which we try the services of those we trust; and should we wander from them in moments of error or alarm, let us hasten to retrace our steps and to regain the road which alone leads to peace, liberty and safety."

First Inaugural Address, Thomas Jefferson, March 4, 1801.

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JURISDICTIONAL STATEMENT

(1) The title of the case is, People of the State of New York, Respondent against Michael Magnano, Appellant.

(2) The Court from which the Appeal is taken is the Appellate Division, Fourth Department.

(3) The date of the Order granting leave to appeal is June 5, 1990.

(4) The Order appealed from is the Order of the Appellate Division, Fourth Department, entered February 2, 1990, affirming Judgment of the Allegany Court entered May 4, 1988.

(5) Name and address of the attorney for the Respondent is, Donald Zuckerman, Esq., Special Assistant Attorney General, Medicaid Fraud Control, 270 Broadway, New York 10007-2379.

(6) This Court has jurisdiction to entertain the instant Appeal pursuant to the exception to C.P.L. 470.05 insofar as the error complained of is so fundamental that it did, in fact, effect the organization of the Court and/or the mode of pleadings prescribed by law exemplified by this Court's Decisions in People v. Bradner, 107 N.Y. 1; People

v. Miles, 289 N.Y. 360; People ex. rel. Battista v. Christian, 249 N.Y. 314; People v. McLucas, 15 N.Y.2d 167; Cancemi v. People, 18 N.Y.2d 128; People v. Patterson, 39 N.Y.2d 288; People v. Michael, 48 N.Y.2d at 1; People v. Thomas, 50 N.Y.2d 467; People v. Lopez, 71 N.Y.2d 662.

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People v. Carroll, 3 N.Y.2d 686

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People v. Ryan, 19 N.Y.1d 100

People ex rel. Rohrlich v. Follette 20 N.Y.2d 297.

Criminal Procedure Law Section 320.10, subd.2.

People v. Parker, 57 N.Y.2d 136.

People v. Reason, 37 N.Y.2d 351.

Faretta v. California, 422 U.S. 806.

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People v. Delgado, 635 F.2d 889 (7th Circuit 1981).

United States v. Anderson, 704 F.2d 117 (3rd Cir).

United States v. Cochran, 770 F.2d 850 (9th Cir.)

United States v. Reyes, 603 F.2d 69 (9th Cir.).

Criminal Procedure Law Section 470.05(2)

Criminal Procedure Law Section 470.05.

People v. Bradner, 107 N.Y. 1

People v. Miles, 289 N.Y. 360.

People ex. rel. Battista v. Christian, 249 N.Y. 314.

People v. McLucas, 15 N.Y.2d 167

Cancemi v. People, 18 N.Y. 128

People v. Patterson, 39 N.Y.2d 288,

People v. Michael, 48 N.Y.2d 1.

People v. Thomas, 50 N.Y.2d 467.

People v. Lopez, 71 N.Y.2d 662.

STATEMENT OF THE CASE

On or about March 19, 1987, a grand jury in the County of Allegany returned Indictment Number 87-014, (A.R. - 110/162) as against Michael Magnano, charging him with Offering a False Instrument for Filing in the First Degree (P.L. 175.35, 12 counts), Deviating from the Terms for Prescription (Ed.L. 6816[1]a 15 counts), Misbranding a Drug (Ed.L. 6811 [10], 15 counts) and Criminal Solicitation in the Fourth Degree (P.L. 100.05, 1 count).

On or about February 29, 1988, Mr. Magnano was brought to trial in the County Court, County of Allegany, Honorable Wayne A. Feeny presiding. The

prosecution was brought by the Deputy Attorney General for Medicaid Fraud Control.

On February 29, 1988, the trial court, without making proper inquiry of the Defendant on the record, accepted a written waiver of trial by jury and proceeded with a bench trial of the Indictment. The only colloquy had of the Appellant by the Court, relative to the waiver of his constitutional right to a trial by jury is reflected in the record thus:

> "THE CLERK: Defendant and all counsel present, Your Honor.
>
> THE COURT: Mr. Boreanaz, I would assume that our first order of business this morning should be the signing and consent to proceeding to trial without a jury by Mr. Magnano. Is that your position?
>
> MR. BOREANAZ: Yes, Your Honor,

may the record reflect that here in court is Mr. Magnano and in my presence has signed a written waiver which has been prepared, and I have likewise put my signature on the same document. With the permission of the Court I tender it to the Court.

THE COURT: Mr. Russell, do you have any objection to proceeding without a jury in this matter?

MR. RUSSELL: No, Your Honor.

THE COURT: All right, Mr. Magnano, you do acknowledge to me that you have signed the waiver of jury trial and agree that we can proceed on this matter without a jury trial?

MR. MAGNANO: Yes, Your Honor.

THE COURT: All right, let the record reflect that I will approve the waiver of trial by jury and allow it to be tried without a jury and sign the order accordingly. Let's have it marked as Court's Exhibit 1.

(Court's Exhibit 1 marked for identification.)

THE COURT: All right, counsel, are there any other

housekeeping-type requests or motions or otherwise at this time prior to starting the trial?"

At the conclusion of the trial, the Court found Mr. Magnano guilty on 39 of the 43 counts charged against him. The Court then sentenced Mr. Magnano to indeterminate terms of 2 to 4 years on each of the 11 False Filing counts, definitive terms of 6 months on each of the 14 Deviating from the Terms of Prescription counts, and a 6 month term on each of the 14 Misbranding counts, all sentences to run concurrently. (A.R. - 171/85)

On or about May 26, 1988, Michael Magnano, by his attorney filed a Notice of Appeal (A.R. - 108) relative to the aforementioned Judgment of conviction and sentence. (A.R. - 171/185) The

Appeal was duly perfected before the Supreme Court of the State of New York, Appellate Division, Fourth Department. (A.R. - 77) The matter was briefed by Gary Greenwald, Esq., for the Defendant/Appellant and Donald H. Zuckerman, Special Assistant Attorney General on behalf of the People. (A.R. - 39) Subsequent to the oral argument, with the permission of the Appellate Court, the attorney for the Appellant submitted a supplemental Brief in letter form (A.R. - 31) distinguishing People v. Johnson, 51 N.Y.2d 986. After hearing oral argument by the aforementioned attorneys, the Appellate Division, Fourth Department, on or about March 2, 1990, in a Memorandum Decision, affirmed the conviction and entered an

Order to that effect. (A.R. - 192) In affirming the conviction, the Fourth Department held:

> "No assertion by defendant to the contrary is found in the record. Thus, defendant's claim of error with respect to the procedure followed in approving waiver is not preserved for review." (citations omitted) (A.R. - 194)

The Appellant, by his attorney, asserting that the aforementioned Decision and Order of the Appellate Division, Fourth Department was error made application to this Court for leave to appeal. (A.R. - 4)

On or about June 5, 1990, the application for Leave to Appeal to this Court was granted by the Honorable Vito J. Titone. (A.R. - 1)

POINT I. THE BENCH TRIAL HELD IN THE MATTER AT BAR WAS HAD IN VIOLATION OF APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHT TO A TRIAL BY JURY

The bench trial held in the matter at bar was had in violation of Appellant's State and Federal Constitutional rights to a trial by jury. It is most respectfully submitted to this Court, that the trial court's acceptance of what purportedly was a valid waiver of the Appellant's constitutional right to a trial by jury without making any inquiry whatsoever into the voluntariness of the waiver, effectively denied the Appellant's right guaranteed to him by the New York State Constitution, as well as the Constitution of the United States.

Historically, a defendant has a constitutional right to a trial by jury, relative to a serious criminal charge. Prior to the amendment to the New York State Constitution in 1937, a defendant could not in any fashion waive his right to a jury trial. In People v. Cosmos, 205 N.Y. 91, it was held:

> "The sacredness and importance of the right to trial by jury is attested by the arrangement, no less than by the language, of our Constitution. The first great command of that charter of our rights provides that 'no member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers' (Article 1, Section 1); and the second is that 'the trial by jury in all cases in which it has been heretofore used shall remain inviolate forever.' Article 1, Section 2. And, as if to lend solemnity and emphasis to this declaration in the second

> section, it is further ordained that 'a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law.' Article 1, Section 2. The inevitable implication of this language is that the citizen is not only entitled to the trial by jury in all cases in which it has been heretofore used, but that in criminal cases in which it has been heretofore used it cannot be waived by either party." **Ibid.** 205 N.Y. at 95-96.

In 1937, for the first time in the history of New York State, the New York State Constitution was amended to allow such a waiver. The Constitution now stated:

> "A jury trial may be waived in a manner to be prescribed by law by the parties in all civil cases and by the defendant in all criminal cases, except those in which the crime charged may be punishable by death."

That amendment, however, did not address the manner in which such a waiver should be made.

The Constitutional Convention of 1938 proposed and adopted a further amendment to the Constitution which was ratified by the voters of the State and became effective in 1939. This amendment to Article 1, Section 2 remains in force to date. Article 1, Section 2, of the New York State Constitution reads in pertinent part:

> "Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provisions shall remain inviolative forever; ... a jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court

> having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver." Article 1, Section 2. New York State Constitution.

The amendment granted to the legislature the power to fix the methodology for the waiver of a jury criminal case. Prior to the Criminal Procedure Law being passed the governing statutes in relationship to a procedure was found in the Code of Criminal Procedure. However, within this body of law was absent any statutory direction for the waiver of a jury trial.

Despite the absence of any statute from 1939 to 1969, a limited body of case law developed. (See People v. Carroll, 3 N.Y.2d 686; People v. Diaz,

8 N.Y.2d 1061; People v. Duchin, 12 N.Y.2d 351; People v. Ryan, 19 N.Y.2d 100; and People v. ex rel Rohrlich v. Follette, 20 N.Y.2d 297). However, none of the cases set forth a specific catechism within which a legal calculus could be advanced which would adhere to the constitutional mandate previously approved.

It was not until the enactment of the Criminal Procedure Law in 1969, that the legislature saw fit to comply with the mandate of Article 1, Section 2, by enacting a law governing the form, content, manner and time and presentation of the instrument effectuating such a waiver. The legislature did so with the passage of Criminal Procedure Law 320.10, subd.2,

which reads in pertinent part:

> "Such waiver must be in writing and must be signed by the defendant in person in open court in the presence of the court, and with the approval of the court. The court must approve the execution and submission of such waiver unless it determines that it is tendered as a stratagem to procure an otherwise impermissible procedural advantage or that the defendant is not fully aware of the consequences of the choice he is making. If the court disapproves the waiver, it must state upon the record its reasons for such disapproval." Section 320.10, subd 2. Criminal Procedure Law.

It is most respectfully submitted that any reading of the language of the Constitutional Amendment "with the approval of a judge or justice," in conjunction with the operative words of the statute ... or that the defendant is not fully aware of the choice he is making," clearly demonstrates that

there is an implicit obligation on the part of the court accepting the waiver to ascertain that the defendant's constitutional right to trial by jury is being validly waived.

Despite the fact that both the Constitutional Amendment itself, as well as the statute, is silent as to the proper procedure which should be utilized by the trial court in making the decision to give the "approval of the court," it is suggested that any construction of the language utilized, makes it clear that the court must make an inquiry and/or hold a colloquy with the defendant himself, before the court can make a determination as to the validity of the waiver and the propriety of the court's giving its "approval to

that waiver."

An examination of the Record of the Constitutional Convention of 1938 and the debate concerning the specific language to be utilized in the amendment as proposed and adopted by that body clearly demonstrates that it was the intent of the framers of the amendment to place the burden of protecting the defendant's constitutional right to a jury trial on the trial court approving such a waiver. This Court's attention is most respectfully drawn to the statement of the Honorable Charles B. Sears, then presiding justice of the Appellate Division, Fourth Department, the Chairman of the Judiciary Committee in explaining the proposed amendment which his committee had drawn:

"Mr Sears: Mr. Chairman, the Judiciary Committee has prepared an amendment to Section 2 of Article I of the Constitution in relation to trial by jury. There are several different parts of this amendment. The first provision is to continue the constitutional guarantee undiminished. The second proposal and the main one here involved, is to restrict to a certain extent the present constitutional provision in relation to the waiver of the right to a jury trial by a person brought to trial in a criminal case.

It will be remembered that at the last election, an amendment was adopted providing that there might be a waiver of jury trial by a defendant in a criminal case. I will take the liberty of reading that part of the section which was written into the Constitution by the amendment so adopted.

The provision is:

'A jury trial trial may be waived in the manner to be prescribed by law by the parties in all civil cases.'

That has long been in the Constitution. And then the words were added: 'and by the defendant in all criminal cases, except those in which the crime charged may be punishable by death.'

It was thought by the proposer of two amendments that there should be some restriction upon the right to waiver, so as to assure the defendant an understanding of what he was doing, and it was proposed that the waiver must be made in writing and in court as a protection to the rights of the defendant.

We re-wrote the proposals to a slight extent. We divided the part about the waiver in civil cases from the part relating to the waiver in criminal cases, making the part about the waiver of jury trial in criminal cases a new sentence, so that it would read: 'A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death.' That was the previous rule. And we added ~by a written instrument signed by the defendant in open court before and with the approval of a judge

or justice of a court having jurisdiction to try the offense.'

The proposal is a very simple one. It is intended to protect the rights of the defendant, to assure him by the necessity for an approval by the judge of full opportunity to understand what he is doing. That is all that there is in this proposal, and we ask that that be advanced." Record of the Constitutional Convention of 1938, Vol.2, page 1273-1274. [Emphasis added.]

Additional comment in the "Record" by Judge Sears, further emphasizes the fact that the framers of the amendment clearly intended to place this burden on the Court accepting the waiver. At a point in the debate where a Mr. Garey had proposed that language be added inserting after the words "signed by the defendant," the words "in person;" after some debate on the necessity of

adding those specific words, Judge Sears stated:

> "Mr. Sears: After what has been said here, and after you consider the words before and with the approval in open court, before and with the approval of a judge, or a justice, it seems to me that there can be no doubt the intention is that the committee proposed, and I take it it will be the intention of this body, if it adopts this proposal, that the waiver must be made by the defendant in person.
>
> Mr. Garey: Judge, that proceeds upon the assumption that everybody in every court throughout the State, whoever deals deals with this subject, will know all we are talking about today at the time that is first done in a court room. The fact is that a great many things happen and subsequently somebody gets busy and goes through the books, and goes through the Records of this Convention, and discovers what we can cure now by putting in these simple words. Then they cannot misconceive it at all.
>
> Mr. Sears: Very well, Mr.

Garey, I will include that in my amendment." Record of the Constitutional Convention p.1276.

The framers absolute intent to place the burden on the trial court in this regard is further exemplified in the dialogue had between Mr. Weinfeld and Judge Sears during the debate as to the propriety of adding language to the Constitutional Amendment which would make it mandatory that the waiver be made after consultation with counsel.

"Mr. Weinfeld: Judge Sears, I take it that the committee gave consideration to all proposals on this particular subject.

Mr. Sears: Yes.

Mr. Weinfeld: I find that some of them, including some presented by me, used the words, 'after consultation with counsel.'

I should like to ask Judge Sears the reason which prompted the committee to disregard the use of that language in submitted the

proposed amendment.

Mr. Sears: We thought that that was sufficiently covered by requiring the approval of the judge, because we believe that you could rely upon the judge of the very court which had jurisdiction to try the case to see that the defendant was well advised, and if the judge thought it was necessary for him to consult counsel, he would see that that would be done, but there may be cases where the defendant says he does not want to have counsel, and that would prevent his waiving in such a case, and where we allow a defendant to plead guilty without the advice of counsel, we think we can trust him with the power to waive a jury without the advice of counsel, if the judge approves.

In most cases undoubtedly the judge would say, 'You had better consult counsel. Have you consulted counsel? Have you counsel?' We thought it best not to so strictly confine it as was proposed in the amendment of which you speak.

"Mr. Weinfeld: Of course, I do not want to be placed in the delicate position of questioning

the wisdom of judges, or the fairness or impartiality of judges in this situation, and I want it understood I am not doing that, but in this proposition you are considering a fundamental right of the defendant, which right a defendant is given by the process which you intend to write into this Constitution. Included in that fundamental right is trial by jury, which a defendant is now waiving, but he has the right of counsel. I can readily understand the reason which influenced the members of the Committee on Judiciary to feel that once a judge has passed upon the question in open court that ought to be sufficient. Well, I feel the right of representation by counsel, where one is waiving so fundamental a right, should be preserved and that a defendant ought not to be permitted to waive that right until after consultation with counsel, and I believe the court should appoint counsel for a defendant, just as is frequently done in the courts today, before he yields that right.

Mr. Sears: Yes, but the defendant may decline to have counsel. In that case he should not waive trial by jury.

Mr. Weinfeld: That, of course, may be obviated by an amendment. If a defendant refused to have counsel after the court tendered him counsel, that is the end of the question.

Mr. Sears: All I can say is, it was carefully considered, and I believe that the protection which we provide in the requirement that it should be in open court, in the presence of the judge and with the judge's approval, which was not included, I think, in your amendment, that with those protections we had nothing to fear for such a defendant. That was our view." Record of the Constitutional Convention, p. 1277.

It is most interesting to note, that the aforementioned Mr. Weinfeld persisted in his attempt to add language to the amendment which would mandate that the waiver be made after consultation with counsel. Despite Mr. Weinfeld's forceful argument on this

point, his amendment was voted down. The framers rejected Mr. Weinfeld's argument for mandating the intervention of counsel in such a situation. Instead they chose to place that burden on the trial court. This was done despite Mr. Weinfeld's forceful statement in support:

> "Mr. Weinfeld: Mr. Chairman, may I be hard for just a moment?
>
> The Chairman: Mr. Weinfeld.
>
> Mr. Weinfeld: I listened with great deal of interest to the amendments offered by Judge Sears to his proposal, in the hope that it would obviate the need for the amendment which I have suggested, but I feel that his proposed amendment merely goes to the form of the waiver to be executed by a defendant, -
>
> Mr. Foley: Form and manner.
>
> Mr. Weinfeld: Even as to manner. But we are dealing with

fundamental rights, the question of the waiver of trial by jury by a man charged with crime, and under those circumstances it should be written into the Constitution, because it may well be that no provision will be made by any Legislature to cover the objection which I have made tonight, that a man may be deprived of his right to trial by jury without a full and adequate understanding of just what he is doing. And I say with the utmost of respect for the learned judges who are in this Convention that on occasion judges misunderstand their judicial function to the extent that they become part of the prosecution, that is, from a defendant's viewpoint. And from the viewpoint of the administration of justice it would seem to me that it ought not to lie in the mouth of a defendant ever to say that he waived his right to trial by jury without having been advised by counsel of his own choice and selection." Record of the Constitutional Convention, p.1286.

As noted supra, the language of Criminal Procedure Law 320.10 essentially tracks the language of the

original Constitutional Amendment. Criminal Procedure Law 320.10 mandates that the trial court approves the execution and submission of the waiver unless the court determines:

> "...that the defendant is not fully aware of the consequences of the choice he is making."

Unfortunately, both the Constitutional Amendment and the statute are silent as to the proper procedure which should be utilized by a trial court in determining that it should approve the waiver. It is submitted, however, that implicit in the mandate of both the Constitutional Amendment, as well as the statute, is that the court must make an inquiry and/or hold a colloquy with the defendant himself, before the court can make a determination that the defendant

is fully aware of the consequences of the choice he is making. It follows logically, that a trial court's failure to so inquire renders any such waiver a nullity and thus constitutes reversible error.

It is most respectfully urged that this Court should look to its prior decisions when determining the criteria which must be met before a court may accept a waiver of such a fundamental constitutional right in analogous situations such as the waiver of the right to counsel at trial and the waiver of a jury trial made by a defendant when entering a guilty plea in considering the propriety of the trial court's acceptance of the waiver in the matter at bar.

This Court's attention is most respectfully drawn to the language utilized by it in People v. Duchin, 12 N.Y.2d 351, where, while interpreting what constitutes a valid waiver, it was held:

> "An accused who admits his guilt, and does so with full appreciation of his act, may not be compelled to stand trail against his will. And, if this be so, certainly, a defendant may not be forced to a trial before a jury if it sufficiently appears that his election to be tried without one was made knowingly and understandingly, based on an intelligent, informed judgment." Ibid. 12 N.Y.2d at 353.

In People ex rel. Rohrlich v. Follette, 20 N.Y.2d 297, this Court again emphasized the necessity of a voluntary, knowing and intelligent waiver relative to a defendant's right

to trial by jury, where it was stated:

> "...We have been scrupulous in enforcing compliance with the waiver provisions in those cases in which waiver is permissible. (See People v. Ryan, 19 N.Y.2d 100.)" Ibid. 20 N.Y.2d., at 300.

The Court in Rohrlich, supra, stated further:

> "Since the passage of the amendment the rule which has evolved from the cases is that the requirement of judicial approval is designed to insure that the defendant waiver is a knowing and intelligent one and that the discretion of the Trial Judge to deny a defendant's request to waive a jury trial is limited to those cases in which some "compelling ground arising out of the attainment of the ends of justice" requires that the request be denied." Ibid. p. 300.

Any doubt as to the necessity of applying constitutional standards to a waiver in this context is dispelled by

the language utilized by Chief Judge Wachtler writing for the Court in People v. Parker, 57 N.Y.2d 136. Although in that matter Judge Wachtler was addressing the issue of a defendant's waiver of his right to be present at trial, the principle enunciated is clearly depositive of the question at bar. In Parker, supra, Judge Wachtler stated:

> "Although the right to be present at a criminal trial may be waived, the right is of a fundamental constitutional nature and therefore the validity of any waiver including one which could be implied, must be tested according to constitutional standards. Thus, in People v. Epps, 37 N.Y.2d, supra, at p. 350, 372 N.Y.S.2d 606, 334 N.E.2d 566 we noted that the key issue was whether this defendant knowingly, voluntarily and intelligently relinquished his known right (Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461)." Ibid. 57

N.Y.2d, at 140.

It is submitted that an analogy can and should be drawn between a defendant waiving his fundamental right to trial by jury with that of a defendant waiving his right to be represented by an attorney during the course of a trial. This Court has stressed the necessity of inquiry by a trial court to determine the validity of such a waiver. In People v. Reason, 37 N.Y.2d 351, the Court, relying on United States Supreme Court's decision in Faretta v. California, 422 U.S. 806 and Westbrook v. Arizona, 384 U.S. 150, as well as their own prior decision in People v. McIntyre, 36 N.Y.2d 10, held:

"Although petitioner received a

> hearing on the issue of his competence to stand trial, there appears to have been no hearing or inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel and proceed, as he did, to conduct his own defense. "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused -whose life or liberty is at stake- is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." Johnson v. Zerbst, 304 U.S. 458, 465, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461; Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70." **Ibid.** 37 N.Y.2d, at 355-356.

This is the essential and appropriate inquiry which the Court must make before accepting a waiver of a fundamental constitutional right.

Again, in People v. Sawyer, 57

N.Y.2d 12, this Court stressed the necessity for judicial inquiry in this regard:

> "At the root of the rule calling for special inquiry before a defendant may proceed pro se is recognition that implicit in a defendant's exercise of the right to do so is a concomitant right to forego the advantages of counsel (Faretta v. California, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562). To make sure this is well understood, more is required than that the right be "unequivocally and timely asserted". Substantively, it must be "knowing and intelligent" as well. (People v. McIntyre, 36 N.Y.2d 10, 17, 364 N.Y.S.2d 837, 324 N.E.2d 322). To ascertain that it is, the court should undertake a sufficiently "searching inquiry" of the defendant to be reasonably certain that the "dangers and disadvantages" of giving up the fundamental right to counsel have been impressed on the defendant (see Faretta v. California, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562, supra; People v. White, 56 N.Y.2d 110, 117, 451 N.Y.S.2d 57, 436 N.E.2d 507). Appropriate "colloquy on

the record between the judge and defendant' will not only test the defendant's understanding, but provide an objective basis for review (United States v. Bailey, 675 F.2d 1292 (D.C.Cir. 1982); see United States v. Dujanovic, 486 F.2d 182 (9th Cir.); United States v. Plattner, 330 F.2d 271 (2nd Cir.))." Ibid. 57 N.Y.2d, at 21.

It cannot be controverted that this Court has, in a long line of cases, held unequivocally that upon accepting a guilty plea, the trial court must conduct an allocution. People v. Serrano, 15 N.Y.2d 304; People v. Beasley, 25 N.Y.2d 483; People v. Francis, 38 N.Y.2d 150; People v. Harris, 61 N.Y.2d 9; and People v. Lopez, 71 N.Y.2d 664. During that allocution, the court must ascertain to its own satisfaction, that the plea and resultant waiver of a trial by jury is

being made knowingly and voluntarily by the defendant. Further, the defendant must acknowledge his guilt by allocuting facts which demonstrate his guilt of the crimes charged. It is axiomatic that this allocution must be had of the defendant, even though he is represented by an attorney who is present at his side. The trial court cannot assume that because the defendant is "represented" that the plea and resultant waiver is being made intelligently, knowingly, freely and voluntarily. The trial court must ascertain this on the record from the defendant himself, not through his attorney.

This Court's attention is most respectfully drawn to its recent

decision in People v. Lopez, 71 N.Y.2d 664, in which this Court reiterated and set forth once again the trial court's duty, relative to accepting a guilty plea, and further, holding that on the Court's failure to properly do so, the defendant may challenge the sufficiency of the allocution on a direct appeal notwithstanding that a formal post allocution motion was not made. In Lopez, supra, the court stated:

> "In the rare case, however, where the defendant's recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea, we have held that the trial court has a duty to inquire further to ensure that defendant's guilty plea is knowing and voluntary (see, People v. Francis, 38 N.Y.2d 150, 153, 379 N.Y.S.2d 21, 341 N.E.2d 540; People v. Beasley, 25 N.Y.2d 483, 487-488,

307 N.Y.S.2d 39, 255 N.E.2d 239; People v. Serrano, 15 N.Y.2d 304, 309, 258 N.Y.S.2d 386, 206 N.E.2d 330; see generally, People v. Harris, 61 N.Y.2d 9, 471 N.Y.S.2d 61, 459 N.E.2d 170). Thus, where a defendant's factual recitation negates an essential element of the crime pleaded to, the court may not accept the plea without making further inquiry to ensure that defendant understands the nature of the charge and that the plea is intelligently entered (see, People v. Beasley, 25 N.Y.2d 483, 307 N.Y.S.2d 39, 255 N.E.2d 239, supra [factual recitation appeared to negate essential element and evidence showed defendant may not have understood nature of charge]; People v. Serrano, 15 N.Y.2d 304, 258 N.Y.S.2d 386, 206 N.E.2d 330, supra, [factual recitation negated essential element]). Where the court fails in this duty and accepts the plea without further inquiry, the defendant may challenge the sufficiency of the allocution on direct appeal, not- withstanding that a formal postallocution motion was not made (People v. Beasley, 25 N.Y.2d 483, 307 N.Y.S.2d 39, 255 N.E.2d 239, supra, People v. Serrano, 15 N.Y.2d 304, 258 N.Y.S.2d 386, 206 N.E.2d 330, supra). In such cases, the

court's attention should have been instantly drawn to the problem, and the salutary purpose of the preservation rule is arguably not jeopardized." Ibid., 71 N.Y.2d, at 666-667.

This Court is urged to note, that although the rule is somewhat different in the federal courts, insofar as the prosecutor must consent to a waiver of trial by jury, still our federal courts require the trial court to ascertain that the waiver of a jury trial is made freely, voluntarily and knowingly. Instructive in this regard, is the holding of the United States Supreme Court in Patton v. U.S. 281 U.S. 276, where the duty of a trial court in accepting a waiver of a trial by jury is set forth:

"Not only must the right of the

accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity." Ibid., 281 U.S., at 288.

In U.S. v. Delgado, 635 F.2d 889 (7th Circuit 1981), the Appellate Court noted:

"In United States v. Scott, 538 F.2d 362 (7th Cir. 1978), we adopted a supervisory rule governing trial court acceptance of a jury trial waiver. Before

> the district court accepts the waiver, the court must interrogate the defendant "to ensure that [the defendant] understands his right to a jury trial and the consequences of waiver." Ibid., 635 F.2d at 890.

The Court in Delgado, supra, then went on to spell out the type of dialogue which should take place between the trial court and the defendant so that a proper record may be had to determine if, in fact, the purported waiver was made knowingly and voluntarily:

> "The Scott opinion did not specify the questions that should be addressed to the defendant; rather, we advised the district courts to adopt some type of formal jury waiver inquiry. We take this opportunity to advise the trial courts that they should explain that a jury is composed of twelve members of the community, that the defendant may participate in the selection of jurors, and that the verdict of

> the jury is unanimous. The court should inform the defendant that if he waives a jury, the judge alone will decide guilt or innocence. After informing the defendant of these factors, the trial court should then ascertain whether the defendant wishes to waive his right to a jury trial. Only after this type of inquiry will the court be able to determine that the defendant understands his right to a jury trial and the consequences of waiver." Ibid. 635 F.2d at 890 (7th Cir. 1981).

Similar reasoning was followed by other federal courts in United States v. Anderson, 704 F.2d 117 (3rd Cir.), United States v. Cochran, 770 F.2d 850 (9th Cir.), and United States v. Reyes, 603 F.2d 69 (9th Cir.).

In sum, this Court is most respectfully urged that it should hold that a proper construction of the language of Article 1, section 2, of the Constitution of the State of New York,

as well as the language of Criminal Procedure Law 320.10, mandates that a trial court conduct a colloquy or inquiry of the defendant who is purportedly waiving his right to a trial by jury and that trial courts must ascertain on the record, that the waiver is being made knowingly, intelligently, freely and voluntarily and that then and only then, may a trial court properly make a decision to approve or deny that waiver. The Trial Court in the matter at bar having failed to do so, this Court should reverse the Appellant's conviction.

In addition, it is most respectfully submitted to this Court that the trial Court's failure to properly ascertain on the record that

the Defendant's purported waiver was being made knowingly, intelligently, freely and voluntarily, was also violative of the Defendant's Constitutional Right to a trial by jury as guaranteed him by the United States Constution and as such, constitutes reversible error in that regard.

POINT II. THE APPELLATE COURT'S AFFIRMANCE WAS HAD IN ERROR

It is most respectfully submitted, that the Appellate Division's affirmance of the conviction at bar was erroneous. Essentially the decision of the Appellate Court relied on a misapplication of this Court's Memorandum Decision in People v. Johnson, 51 N.Y.2d 986. The Appellate Court held that the issue of the trial court's failure to ascertain on the record that the Appellant's waiver of his right to a trial by jury had not been preserved by a timely objection and therefore the issue was not preserved for Appellate review. The court held that the only remedy available to the Appellant was to bring a motion pursuant to C.P.L. 440. It is submitted that

this decision by the Appellate Division was prompted by their failure to properly understand the distinction, both in the factual situation and in the argument presented to the court between the issues in People v. Johnson, **supra**, and the matter at bar. It is submitted that Johnson, **supra**, is clearly distinguishable from the matter at bar and that the reasoning of this Court in that matter is not applicable.

An examination of the dissent in People v. Johnson, 72 A.D. 2d 689, demonstrates that in that matter, the thrust of the Appellant's argument was both ineffective assistance of counsel and allegations that the trial court was aware of Mr. Johnson's long psychiatric history and knew or should have known,

that the waiver was invalid based on knowledge acquired by the court 'de hors' the record. This Court's Decision which upheld the Appellate Division's affirmation without opinion, was based on two distinct points. The first point made by this Court was:

> "The issue raised with respect to the procedure followed in approving the appellant's waiver of jury trial was not preserved for review (CPL 470.05, subd. 2)." People v. Johnson, 51 N.Y.2d 987

The second point set forth in the aforementioned decision was:

> "Moreover, quite apart from the lack of preservation, there is nothing on this record to afford a basis for determination of the question now raised for the first time. As the People correctly argue, the appellant's present claim that his participation in the waiver was not knowing and

> voluntary implicates his relationship with his trial attorney and is to be proved, if at all, by facts outside the trial record in a proceeding maintainable under CPL 440.10." Ibid., supra, 987.

To apply the logic of Johnson, supra, to the matter at bar, the Appellate Division would have had to accept the premise put forth in the Respondent's brief that the Appellant's argument is based on matters de hors the record, and as such, the only procedural remedy available to the Appellant is a motion pursuant to C.P.L. 440. It was and is the Appellant's position, that the error complained of is not 'de hors' the record, but exists by the absence in the record of any effort on the part of the trial court to make a proper inquiry relative to the waiver of Appellant's

constitutional right to a trial by jury. It is this failure on the part of the trial court, conspicuous by its absence in the record, which constitutes the reversible error which was the proper subject of the Appeal, both in the Appellate Division and before this Court.

The issue before the Appellate Division and which issue is now before this Court is whether the record supports a finding of a voluntary and knowing waiver of his right to a jury trial by the Appellant. It is again submitted that the New York State Constitution, as well as the statute requires this.

The gravamen of the Respondent's argument at the Appellate Division, is

that an objection not having been made on the record during the course of the trial, the alleged error has not been preserved for Appellate review pursuant to C.P.L. 470.05(2).

It is most respectfully submitted that the question raised at the Appellate Division and presently at bar, clearly falls within the exception to C.P.L. 470.05, insofar as the error complained of is so fundamental that it did, in fact, effect the organization of the court and/or the mode of pleadings described by law as exemplified by this Court's decision in a long line of cases.

It cannot be controverted, that a citizen who is a subject of a felony Indictment, has a constitutional right

to trial by jury both under Article 1, Section 2 of the New York State Constitution, as well as the United States Constitution. It is submitted that in the matter at bar, the trial Court's error, in accepting a waiver without making a proper inquiry and reaching a conclusion on the record, that the waiver in question was made knowingly, willingly and voluntarily, is such fundamental constitutional error as to be reviewable by this Court, despite the absence of preservation of that error at the trial level.

It is most respectfully submitted that this Court's own prior decisions, make is readily clear that this Court has the power to review such error. This Court has traditionally so held in

a variety of factual situations. People v. Bradner, 107 N.Y. 1 (jurisdiction of trial court); People v. Miles, 289 N.Y. 360 (waiver of right to be tried by indictment returned by a grand jury, waived by defendant's counsel); People ex. rel. Battista v. Christian, 249 N.Y. 314 (waiver of indictment and plea to an information charging a capital crime); People v. McLucas, 15 N.Y.2d 167 (court's improper reference to a defendant's failure to testify); Cancemi v. People, 18 N.Y. 128 (wiaver of right to trial by 12 jurors); People v. Patterson, 39 N.Y.2d 288 (shifting of burden of proof to defendant); People v. Michael 48 N.Y.2d 1 (douple jeopardy); People v. Thomas, 50 N.Y.2d 467 (charged to jury

shifting burden of proof to defendant); and People v. Lopez, 71 N.Y.2d 662 (failure of trial court to make a proper inquiry when accepting a guilty plea).

This Court's attention is most respectfully drawn to the language utilized by this Court in analyzing the exception to the requirement of a timely objection in People v. Patterson, supra. The court held:

> "There is one very narrow exception to the requirement of a timely objection. A defendant in a criminal case cannot waive, or even consent to, error that would affect the organization of the court or the mode of proceedings prescribed by law. (Cancemi v. People, 18 N.Y. 128, 138; People v. ex rel. Battista v. Christian, 249 N.Y. 314, 319, 164 N.E. 111, 113.) In Cancemi, it was held that a defendant could not consent to being tried by a jury of less than 12 members. In People v. ex rel. Battista v. Christian supra, the court ruled that an information charging a

defendant with an "infamous" crime was a nullity, despite defendant's consent, where the State Constitution provided that infamous crimes could be prosecuted only by Grand Jury indictment. Thus, the rule has come down to us that where the court had no jurisdiction, or where the right to trial by jury was disregarded, or where there was a fundamental, nonwaivable defect in the mode of procedure, then an appellate court must reverse, even though the question was not formally raised below. (People v. Bradner, 107 N.Y. 1, 4-5, 13 N.E. 87, 88; see People v. Miles, 289 N.Y. 360, 363-364, 45 N.E.2d 910, 912.)

This traditionally limited exception has, on occasion, been given broader expression. In People v. McLucas, 15 N.Y.2d 167, 256 N.Y.S.2d 799, 204 N.E.2d at p. 848.) Since the defendant's right against self incrimination had been violated, the judgment of conviction was reversed.

As we view it today, the purpose of this narrow, historical exception is to ensure that criminal trials are conducted in accordance with the mode of procedure mandated by Constitution and statute. Where

> the procedure adopted by the court below is at a basic variance with the mandate of law, the entire trial is irreparably tainted. As we stated nearly 50 years ago, "prosecutions must be conducted in substance and without essential change as the Constitution commands." (People v. ex rel. Battista v. Christian, 249 N.Y. 314, 319, 164 N.E. 111, 112, **supra**.)" **Ibid.**, 39 N.Y.2d, at 295-296.

The Court of Appeals again addressed the issue in People v. Thomas, 50 N.Y.2d 467, and relying on its earlier decision in Patterson, **supra**, and People v. Michael, 48 N.Y.2d at 1, held:

> "As a general rule points which were not raised at trial may not be considered for the first time on appeal (CPL 470.05, subd. 2; People v. Robinson, 36 N.Y.2d

224, 367 N.Y.S.2d 208, 326 N.E.2d 784; People v. Gurley, 42 N.Y.2d 1086, 399 N.Y.S.2d 650, 369 N.E.2d 1183; People v. Kibbe, 35 N.Y.2d 407, 413-414, 362 N.Y.S.2d 848, 321 N.E.2d 773; affd. sub nom. Henderson v. Kibbe, 431 U.S. 145, 97 S.Ct. 1730, 52 L.Ed.2d 203). There is, however, one very narrow exception as we noted in People v. Patterson, supra,. In that case we said that no objection is necessary to preserve a point of law for appellate review when the procedure followed at trial was at basic variance with the mandate of law prescribed by Constitution or statute (People

v. Patterson, **supra**, 39 N.Y.2d at pp. 295-296, 383 N.Y.S.2d 573, 347 N.E.2d 898; see, also, People v. Michael, 48 N.Y.2d 1, 420 N.Y.S.2d 371, 394 N.E.2d 1134)." 50 N.Y.2d, at 471.

There is no issue, in the instant matter, that the Trial Court did not, in any fashion, make any attempt to meet its constitutional mandated burden in regard to ascertaining specifically on the record whether the Defendant's waiver of a jury trial was made knowingly, voluntarily and intelligently. More importantly, the Court further took no steps with the prevailing constitutional mandates to determine if the Defendant understood the consequences of his act. It is

true, however, that the Defendant did sign a written waiver. This, however, is not the substitute for a Court to be assured that the constitutional prerogatives mandated for a criminal defendant in regard to a jury trial has been met. A written form, signed by a defendant, where he seeks to make an allocation on a guilty plea or where he seeks to represent himself, would not sustain constitutional nor statutory muster in the absence of a court inquiry.

A defendant's historic right to trial by jury, both under the state as well as under the Federal Constitution, is so inextricably woven into our fundamental fabric of law that the procedure in which a defendant foregoes

this right must be evaluated through a prism of elemental due process. To allow any defendant to waive this fundamental right without one word of inquiry suggests an impermissable denial of constitutional rights. The records as to Michael Magnano is clear. The Trial Court never made an inquiry as to Mr. Magnano's waiver. The Court accepted a written waiver and proceeded **pro forma** to the next step in the trial. Hence, a reversal is mandated. The record of the trial court or, more specifically, the absence of same is properly before this Court for review. The absence of an appropriate inquiry is fatal in regard to the constitutional considerations.

In conclusion, it is urged that a

trial court must make a meaningful inquiry of any defendant so that both the trial court as well as the record is satisfied that the right to a jury trial is being relinquished both due to a knowing and intelligent waiver, and where the defendant understands the consequences of his act. Anything less, must not be acceptable. There is a clear record (or lack of one) for this Court to act upon. Michael Magnano never was asked one question in regard to his waiver. Under existing constitutional interpretations, he should have been queried. To require the Defendant to make a 440 application is to demean a fundamental and essential right given to a defendant in a criminal proceeding. Either, upon the record,

the Defendant was afforded this basic right or he was not. The Court need not look to a 440 application to make this determination.

In sum, it is most respectfully submitted, that the question certified before this Court was properly before the Appellate Division, Fourth Department, and that that body's failure to properly address the question posited was erroneous. It is further suggested that the Court's decision that the only relief available to the Defendant under the circumstances at bar is recourse to a motion pursuant to Article 440 of the Criminal Procedure Law was made without a proper consideration of this Court's holding in Patterson, Michael, and Thomas, **supra**.

The Court has upon the record before it, ample evidence supporting the contention that the Appellant's statutory an dconstitutional rights to a jury trial were denied to him. It is submitted that this Court should reverse the Appellant's Conviction.

CONCLUSION

It is most respectfully urged that the this Court should hold that a valid waiver of both this State and Federal Constitutional right to jury trial may not be had absent a proper inquiry on the Record by the Trial Court and that in light of the absence of such an inquiry in the matter at bar, the Appellant's conviction should be reversed.

Respectfully submitted,

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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

MICHAEL MAGNANO,

Defendant-Appellant.

RESPONDENT'S BRIEF

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COURT OF APPEALS
STATE OF NEW YORK
- X

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

MICHAEL MAGNANO,

Defendant-Appellant.

- X

PRELIMINARY STATEMENT

This is an appeal by defendant-appellant Michael Magnano from an order of the Appellate Division, Fourth Department, entered February 2, 1990, which order affirmed a May 5, 1988, judgment of the Allegany County Court (Feeman, Jr., J.), rendered after a nonjury trial, convicting appellant of offering a False Instrument for Filing in the First Degree (P.L. Section 175.3)

[eleven counts], Deviating from the Terms of a Prescription (Ed. L. Section 6816[1][a]) [fourteen counts], and Misbranding a Drug (Ed. L. Section 6811[10]) [fourteen counts], and sentencing him thereon. Leave to appeal to this Court was granted by Associate Judge Vito J. Titone on June 5, 1990.

Upon information and belief, defendant-appellant is currently incarcerated pursuant to the sentence imposed in this case.

STATEMENT OF FACTS

The Jury Waiver Colloquy

At the outset of the day's proceedings on February 29, 1988, Judge Feeman addressed appellant's counsel, Harold Boreanaz, as follows:

> Mr. Boreanaz, I would assume that our first order of business this morning should be the signing and consent to proceed to trial without a jury by Mr. Magnano. Is that your position? (A.R. 169) 1

Mr. Boreanaz, apprising Judge Feeman that appellant had affixed his signature to the jury waiver form in his attorney's presence and that he, Mr. Boreanaz, had also signed it, then tendered the form to the court (A.R.169)

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1. Numerical references preceded by "A.R." are to appellant's Record on Appeal. Those preceded by "App.Br." are to appellant's brief.

The form, dated February 28, 1988, recited that it had been executed in open court, in the presence of the court. It also stated that appellant had executed it after consultation with counsel and with full understanding of the rights and privileges he thereby waived (A.R. 169).

After the prosecutor was asked whether he objected to a bench trial and responded in the negative, Judge Feeman addressed appellant:

> All right, Mr. Magnano, you do acknowledge to me that you have signed the waiver of jury trial and agree that we can proceed on this matter without a jury trial? (A.R. 169)

With no apparent hesitation, appellant responded in the affirmative (Ibid.).

Judge Feeman then approved the

proffered waiver and signed that form in the space reserved for his signature (A.R. 168-170).

The Evidence At Trial

A. The People's Case

A pharmacist operating two drugstores in the Southern Tier, appellant Michael Magnano was the subject of an anonymous letter sent to the New York State Department of Social Services (DSS) in late 1984 or early 1985; the letter-writer alleged that unlawful substitution of generic for prescribed brand-name drugs was taking place at appellant's Cuba, New York, store (A.R. 804-05). These allegations were referred to the Buffalo Regional Office of the Deputy Attorney General

for Medicaid Fraud Control (DAGMFC), which coordinated a "shopping" [2] program at the Cuba store (A.R. 758-59). Over a six-month period, beginning on July 25, 1985, and ending on February 28, 1986, three "shoppers" made a total of twenty visits to Magnano's Pharmacy (A.R. 759, 800).

Appellant, who had recently been hospitalized, was not present at the pharmacy during the first six weeks of the undercover investigation; on all nine occasions when DAGMFC shoppers presented prescriptions to pharmacist

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2. "Shopping" a pharmacy in the practice of supplying an investigator with prescriptions and a Medicaid card issued in a fictitious name, the purpose being to ascertain whether the pharmacist is complying with the prescriptions' terms (A.R. 759, 799).

Edward Finger in appellant's absence, the prescriptions were properly filled (A.R. 275-76, 298, 803-04). After appellant's return to the pharmacy, beginning on September 5, 1985, and on each and every occasion thereafter that DAGMFC shoppers presented one or more "Dispense-as-Written" (DAW)3 prescriptions to him, he substituted

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3. Endorsement by the prescribing physician on the "Dispense as Written" line of the prescription blank mandates that the brand-name drug specified by him or her be dispensed by the pharmacist. In the event that the physician, by endorsing the "Substitution Permitted" line, authorizes a generic substitute, the pharmacist must write the name of the generic drug and its manufacturer on the prescription label and must also add that information to the prescription itself (A.R. 354-55, 361).

generic for brand in at least one of the prescriptions (A.R. 812-13). Because payment to Medicaid providers is based exclusively upon the representations contained in the claim forms they submit, and the fiscal intermediary payor has no way of ascertaining that the drugs listed were actually dispensed, the system is dependent upon the provider's integrity. Therefore, if a pharmacy provider unauthorizedly substitutes generic for prescribed brand-name drugs, he will inevitably receive payments to which he is not entitled (A.R. 337, 906).

The People's witnesses established fifteen separate instances of unauthorized substitution of generic for brand-name drugs. Through

testimonial and physical evidence, it was demonstrated that seven DAW prescriptions for Antivert, five for Tegopen and one each for Lasix and Pyridium, as well as a "Substitution Permitted" prescription for Benadryl,4 had been surreptitiously countermanded by appellant (see Chart, A.R. 46-48).

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4. Unlike the other prescriptions which evidenced appellant's fraudulent substitution of generic for brand, the Benadryl prescription served as the subject of a false filing count (11) [A.R.121], but not a deviating from the terms or a misbranding count. The prescription for Benadryl expressly authorized the druggist to dispense a generic substitute; Magnano did so, but mislabeled the prescription vial as containing "Benadryl," not the Diphenhydramine he dispensed (A.R. 332-35, 578-79).

Furthermore, evidence was adduced that in each such instance of unauthorized substitution, Magnano's Pharmacy was, in accordance with Medicaid Program practice, paid the brand-name cost of the drug and a dispensing fee of $2.60 per prescription; in none of these 15 instances was there any indication of the face of the prescription that a medication other than that called for in the prescription had been dispensed (A.R. 408-355, 459-60).

The People also offered numerous admissions by appellant that his conduct had been both intentional and knowing, including the following statement made to Frank Skvarek, the investigator in charge of the Magnano's Pharmacy operation:

> I knew you had people coming in with prescriptions, and I did the switch every time. (A.R. 774)

Appellant then went on to tell Skvarek that he found the Medicaid payment system unfair: "I was just trying to get back at the system. They have been screwing me and holding up my money" (A.R. 774, 791).

B. The Defense Case

Appellant, licensed as a pharmacist in 1961, opened his own pharmacy in Cuba four years later. In 1966, just after the Medicaid program came into being, he became a Medicaid provider, and in recent years (1983-1985), his gross annual earnings from the Medicaid system had exceeded $100,000 for the Cuba store alone (A.R. 856-57, 898).

On September 4, 1985, appellant, still recovering from major surgery, and not long back at work, received an anonymous telephone call advising him that he was about to be "shopped" by the DAGMFC (A.R. 866-67). When, on the following day a stranger presented him with four prescriptions to be filed, appellant suspected that he might be the DAGMFC shopper. Appellant attempted to fill the four prescriptions correctly, but one of the four (that for Lasix) he improperly filled with a generic substitute (Furosemide) not labeled as such (A.R. 870-71). Appellant attributed to his weakened state the error in filling that prescription (A.R. 871). After receiving a second anonymous tip, this one advising him

that a shopper using the pseudonym "Donna Davids" would shortly present herself at his pharmacy, he deliberately misfilled with generic substitutes her DAW prescriptions for Antivert and Tegopen (A.R. 871, 875). While testifying that he had deliberately ignored the express terms of those prescriptions, and that he now realized that what he had done was "stupid", appellant averred that it had not been his purpose to defraud the State (A.R. 874-75, 883, 886). Rather his intent was to protest the unfairness of the Medicaid payment system: "[k]nowing that they were coming, I figured maybe that possibly the only way I could do anything like that was to draw their attention [to his difficulties with

Medicaid]" (A.R. 875).

He chose not to tell any of his co-workers about either the anonymous tips he had received or about his plan to protest the infirmities of the Medicaid payment system by baldly substituting generic drugs for the brand-name medications called for in the shopper's prescriptions. In fact, appellant testified, he became even more headstrong as the shopping operation progressed, for when the third shopper arrived, he, despite his having received no advance warning of her visit, immediately concluded that she was a DAGMFC operative. He accordingly reacted to her presentation of a DAW prescription by deliberately substituting a generic drug for the

brand-name drug called for by the prescribing physician, and he proceeded also to deliberately mislabel the vial in accordance with that misrepresentation (A.R. 912-13).

Verdict

Finding appellant guilty on 39 of the 43 counts charged against him, the trial judge rejected as incredible Magnano's defense of lack of criminal intent (A.R. 954-58). Judge Feeman specifically found that appellant was fully familiar with the Medicaid payment procedures and knew, furthermore, that if he did not alter the invoice to reflect that generic had been substituted for brand, a claim for brand-name payment would be processed, and the provider paid accordingly (A.R.

955). The court declared, "[T]he system depends upon the integrity of the individuals, and if the individuals don't have any integrity, the whole system breaks down..." (Ibid).

Judge Feeman, furthermore, rejected outright appellant's claim that his deliberate substitution of generic for brand had been carried out as a form of protest against governmental bureaucracy:

> I cannot believe you, as a professional person, would do it and continued it over a period of time. It just didn't start when you came back to work in September. It went on into the next year. Stupidity, I don't believe is a defense. It doesn't mean that there is not intent there and, I, frankly, just can't buy that part of the story. It just doesn't hit me a being trustworthy and believable, and I am just not going to buy it. (A.R. 955)

Sentencing

On May 5, 1988, appellant was sentenced, as a second-felony offender, to a term of 2 to 4 years on each of the 11 false filing counts, a definite term of six months on each of the 14 deviating from the terms of the prescription counts and a six-month term on each of the 14 misbranding counts, all sentences to run concurrently (A.R. 961-68, 973-75).

OPINION BELOW

The only issue raised on the defendant's appeal to the Appellate Division, Fourth Department, was a claim that his jury trial waiver failed to comply with either Article I, Section 2, of the New York State Constitution or

with CPL Section 320.10(2). In unanimously affirming appellant's conviction, the Appellate Division issued the following memorandum (158 A.D.2d 979):

> The waiver of jury trial signed by defendant and his attorney, and approved by the Judge, states that it was executed "in open court before the undersigned Judge". No assertion by defendant to the contrary is found in the record. Thus, defendant's claim of error with respect to the procedure followed in approving the waiver is not preserved for review (see, CPL 470.05[2]; see, People v. Johnson, 51 NY2d 986; People v. Sierra, 143 AD2d 1065, lv denied 73 NY2d 926). Moreover, there is nothing in the record which would have alerted the court to the possibility that defendant was not fully aware of the consequences of the waiver (see, CPL 320.10[2]; People v. Burnett, 136 AD2d 888, lv denied 70 NY2d 1004). Any claim by defendant "that his participation in the waiver was not knowing and voluntary implicates his relationship with his trial

attorney and is to be proved, if at all, by facts outside the trial record in a proceeding maintainable under CPL 440.10:(People v. Johnson, supra, at 988; see also, People v. Davidson, 136 AD2d 66).

ARGUMENT
POINT I

APPELLANT'S JURY TRIAL WAIVER WAS KNOWING, VOLUNTARY AND INTELLIGENT AND COMPLIED FULLY WITH THE TERMS OF CPL SECTION 320.10(2).

While implicitly conceding (App. Br. 9, 16, 25-26) that the jury trial waiver he executed met the five conditions precedent to acceptance of such a waiver ("Such waiver (1) must be in writing and (2) must be signed by the defendant (3) in open court (4) in the presence of the court, and (5) with the approval of the court." [CPL Section 320.10(2), opening sentence]), appellant

Magnano contends that something more is required. He maintains that

> [I]mplicit in the intent of both the Constitutional Amendment [N.Y.S. Const. Art. I, Section 2], as well as the statute, is that the court must make an inquiry and/or hold a colloquy with the defendant himself, before the court can make a determination that the defendant is fully aware of the consequences of the choice he is making. (App.Br. 16)

Appellant's argument is flawed, however, in (a) its failure to recognize the central advisory role played by counsel in the jury-waiver process -- a circumstance far different from the conditions prevailing at the time of the adoption, in 1938, of Art. I, Section 2, in its present form -- as well as in (b) its erroneous assumption that the same type of detailed colloquy must attend a

jury waiver as attends the taking of a plea of guilty or a determination by a defendant to represent himself at plea or trial.

A. Appellant's Historical Argument Is Devoid of Merit

Much of appellant's brief is devoted to excerpts from the proceedings of the New York State Constitutional Convention of 1938, that body having adopted in its current form Article I, Section 2, of the Constitution (Int. No. 662, Pr. No. 812: Revised Record of the 1938 New York State Constitutional Convention [hereinafter "Convention"], pp. 1600-01). As noted by appellant (App.Br. 6), prior to 1937 an individual charged with a crime was not permitted to waive his constitutionally guaranteed

right to a jury trial. See Bellacosa, Practice Commentary to McKinney's CPL Section 320.10, p. 693. The electorate having at the 1937 general election approved a constitutional amendment authorizing waiver of a jury trial in all but capital cases, the Convention's Judiciary Committee proposed

> that there should be some restriction upon the right to waive, so as to assure the defendant an understanding of what he was doing, and it was proposed that the waiver must be made in writing and in court as a protection to the rights of the defendant.
>
> (Convention, pp. 1273-74: Remarks by Judiciary Committee Chairman and Appellant Division, Fourth Department, Presiding Justice Charles B. Sears; see 1279-82)

Accordingly, the Judiciary Committee proposed, and the Convention adopted, a requirement that the waiver

be solemnized by means of "'a written instrument signed by the defendant in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense.'" (Convention, pp. 1274, 1600-01). With the exception of the addition of a requirement that the waiver be signed by the defendant "in person," and not by an agent, the amendment adopted by the Convention was in substance that proposed by the Judiciary Committee (see Convention, pp. 1274-76, 1600-01). The Convention rejected a proposed amendment by delegate (and later United States District Judge) Edward R. Weinfeld to the effect that to be valid a tendered waiver need be preceded by consultation with counsel (Convention, pp. 1276-78,

1284-86).

Appellant not unreasonably concludes that, in rejecting the Weinfeld amendment, the convention delegates placed upon the trial court the obligation of insuring that the defendant's choice to waive a jury is an informed one (App.Br. 14-16).5 It does not follow from that conclusion, however, that the inquiry by the court into the motivation for or the voluntariness of the defendant's waiver

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5. Justice Sears' remarks support that assessment:

"We thought that that was sufficiently covered by requiring the approval of the judge, because we believe that you could rely upon the judge of the very court which had jurisdiction to try the case to see that the defendant was well advised..." (Record, pp. 1276-77).

need be an extended one or that it need cover the same ground as a guilty plea colloquy, or as an inquiry surrounding a defendant's insistence on proceeding to trial pro se (see Point IB, infra; cf.. App. Br. 19-23). Nor does it follow that the activist role envisioned for the 1938 judiciary should be followed by jurists today, when representation by counsel in even petty criminal cases is universal.

Appellant has, to support his argument, wrenched Justice Sears' remarks (quoted infra, n5 and App. Br. 13) from their historical context. The constitutional debate both parties have described in their briefs took place six years after the Supreme Court first held, in Powell v. Alabama, 287 U.S. 45,

70 (1932), that due process requires that counsel be assigned to represent a capital-case defendant where he is both "unable to employ counsel, and is incapable adequately of making his own defense," and a full quarter-century before the Court held, in Gideon v. Wainwright, 372 U.DS. 335 (1963), that the states are mandated to provide counsel to indigent persons accused of a felony. Furthermore, while "'[t]here has been no time in the governmental history of this state when the court lacked the power to assign counsel for the defense of indigent persons charged with crime'" (People v. Price, 262 N.Y. 410, 412 (1933) [quoting with approval from People ex rel. Saunders v. Bd. of Supervisors, 1 Sheld. 517 [Buffalo City

Ct. 1875]), it was not until 1965 that the Legislature devised a mechanism for providing legal representation to all indigents charged with a crime (L. 1965, ch. 878). 6 See, generally, Belge v. State of New York, 52 Misc.2d 646, 647 (Ct. Claims 1967).

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6. On approving Article 18-B of the Count Law (L. 1965, ch. 878), on July 16, 1965, Governor Rockefeller observed that "[i]n recent weeks [this Court] ha[d] made it unmistakably clear [in People v. Witenski, 15 N.Y.2d 392 (1965)] that every defendant charged with a crime must be afforded a meaningful opportunity to obtain the services of counsel." The Governor further stated that the legislation "represent[ed] a new high in the defense of liberty" and" provide[d] the machinery for guaranteeing the true exercise" of the right to counsel. McKinney's 1965 Session Laws, p. 2117.

That defense counsel in this case properly discharged the advice function is evidenced by the very exchange cited by appellant for the proposition that he may not have comprehended the consequences of his waiver (see App.Br. 2, 33-35). During the colloquy (App. Br. 2), the court addressed defense counsel, Mr. Boreanaz, regarding the defense request to waive a jury, and counsel tendered the operative document to the court after apprising Judge Feeman that appellant had signed the waiver form in the lawyer's presence, and that the lawyer had signed the same instrument.

Not only does the record show appellant's unhesitating acquiescence in the waiver of a jury, but the context in

which the waiver occurred also makes clear that counsel's proffer of the waiver form came as no surprise to Magnano, who while he may have undertaken a post-conviction reappraisal of the situation, had earlier described his attorney as "the best." 7

B. The Jury Waiver Colloquy Was Appropriate to the Circumstances of this Case.

Magnano's argument (App. Br. 34) that Judge Feeman failed to satisfy himself that the well-counselled defendant's jury waiver satisfy himself was knowing, voluntary and intelligent

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7. The statements appellant volunteered to ODAG investigator Skvarek included a boast that,

> I'm going to beat this thing. I've got Boreanaz. He's the best. (A.R. 774).

not only fails to address counsel's central role8, but it also ignores the restrictions which CPL Section 320.10(2) places upon a trial judge's power to reject a tendered waiver.

The second sentence of subdivision (2) of CPL Section 320.10 greatly restricts trial court discretion in this area, for the court must approve the waiver

> unless it determines that it is tendered as a stratagem to procure an otherwise

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8. See, generally, People v. Nixon, 21 N.Y.2d 338, 354 (1967):

> Indeed, if independent and good advice in the interest of the defendant is the goal, it is more important that he consult with competent counsel than a harried, calendar-conscious Judge be the one to perform the function in displacement of the lawyer.

impermissible procedural advantage or that the defendant is not fully aware of the consequences of the choice he is making.

Such narrowing of trial court discretion is in keeping with the intent of the framers of the 1938 constitutional amendment, for adoption of the amendment counterpoised against one another two competing constitutional rights: the right to a jury trial and the right to a trial before a judge alone. The constitutional right to waive a jury trial is deemed so fundamental that its denial is closely scrutinized. This Court has repeatedly cautioned trial judges not to interpose themselves unnecessarily in the jury waiver process. E.G., People ex rel. Rohrlich v. Follette, 20 N.Y.2d 297,

300-301 (1967) (dictum) ["The discretion of the trial Judge to deny a defendant's request to waive a jury trial is limited to those cases in which some 'compelling ground arising out of the attainment of the ends of justice' requires that the request be denied" (quoting with approval from People v. Duchin, 16 A.D.2d 483, 485 (2d Dept. 1962), aff'd 12 N.Y.2d 351 [1963]); People v. Davis, 49 N.Y.2d 114, 120 (1979) ["In its rulings the court assumed to itself authority and responsibility for determining that it would not be in defendant's interest for him either to waiver a jury trial or to represent himself. In so doing the court arrogated unto itself and denied to defendant the exercise of rights

constitutionally guaranteed to him."]' see also People v. Swan, 130 A.D.2d 6, 7-08 (3rd Dept. 1987) [conviction reversed where defendant was denied constitutional right to waive jury trial].

In view of the deference which is to be accorded the defendant's decision to waive a jury, the "impermissible procedural advantage" provisions of CPL Section 320.10(2) has rarely been invoked (but see, People v. Firestone, 111 A.D.2d 696, 698-700 (1st Dept. 1985) [tendered waiver by one defendant in a multi-defendant trial disapproved where court found waiver was employed as "a stratagem to obtain indirectly severance and, therefore, an impermissible procedural advantage"].

While the court possesses somewhat greater discretion to disapprove a jury trial waiver on the basis that the defendant is not fully cognizant of the consequences of his choice, the breadth of that discretion will vary with the defendant who is before the court: the scope of a trial judge's explanation and inquiry regarding a proposed jury waiver is necessarily proportionate to the defendant's need for such guidance from the court. The inquiry will necessarily be more extensive when, for example, there is doubt that the defendant is competent to stand trial [People v. Christopher, 101 A.D.2d 504 (4th Dept. 1984). rev'd other grds. 65 N.Y.2d 424

(1985)]9 the waiver is contrary to his attorney's advice [People v. Christopher, supra], or the date on the proposed waiver is other than the date on which the form is submitted for judicial approval [People v. McDaniel, ___ A.D.2d ___, ___ N.Y.S.2d ___, 1990 N.Y. App. Div. Lexis 16466, #1479 (4th Dept. 12/21/90)].

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9. See also People v. Russell, 74 N.Y.2d 901 (1989), where this Court held the trial judge had not abused his discretion in denying defense counsel's request for a mid-trial CPL Article 730 examination, the trial judge having earlier in the proceeding examined the defendant regarding his decision to forgo the assistance of counsel at trial, having explained to him the legal implications of his proposed jury trial waiver, and having thereafter permitted him to waive a jury trial.

The court's inquiry may be less extensive when, as here, the defendant is familiar with the criminal justice system [see People v. Watson, ___ A.D.2d ___ 57 N.Y.S.2d 29 (1st Dept. 1990)], is a businessman, who businessman, who may be presumed to comprehend the plain import of the waiver [People v. Burnett, 136 A.D.2d 888 (4th Dept.) lv. den. 70 N.Y.2d 1004 (1988)], and is represented by experienced counsel [People v. Watson, supra; People v. Burnett, supra]. Furthermore, in this case, as in People v. Burnett, supra, the trial judge cannot be faulted for having made only a perfunctory inquiry into the waiver's voluntariness, inasmuch as the "defendant failed to rescind his jury waiver or protest his being tried by the

court at any point in the proceeding" (People v. Burnett, supra, at 888).

Furthermore, while appellant would make much of Judge Feeman's failure to offer "one word of inquiry ...in regard to his waiver" (App. Br. 34-35), he does not posit even one question which the court should have asked him. Instead, he argues (App. Br. 19-20) that the right to a jury trial under the state and federal constitutions 10 is no less significant than the constitutional

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10. The numerous federal appellate decisions cited by appellant (App. Br. 23-26) for the proposition that a detailed inquiry of the defendant should precede judicial approval of a tendered jury trial waiver are all predicated upon the supervisory powers of the federal circuit courts over the district

right to counsel and that, therefore, the court need conduct a jury-waiver colloquy with the defendant as detailed as a counsel waiver inquiry.

Equating the two constitutional rights in importance with one another does not mean, however, that the same procedural panoply is required for the waiver of one as for the

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10. (cont.)
courts. See, e.g., United States v. Mitchell, 427 F.2d 1280, 1282 (3rd Cir. 1970); United States v Hunt, 413 F.2d 983, 984 (4th Cir. 1969); United States v. Martin, 704 F.2d 237, 274-75 (6th Cir. 1983); United States v. Scott, 583 F.2d 362, 364 (7th Cir. 1978); United States v. David, 511 F.2d 355, 361 (D.C.Cir. 1975). "There is no constitutional requirement that a court conduct an on the record colloquy with the defendant prior to the jury trial

waiver of the other. See, generally, Washington v. Harper, 110 S.Ct. 1020, 1040-41 (1990); Mathews v. Eldridge, 424 U.S. 319, 334 (1976); Morrissey v. Brewer, 408 U.S. 471, 481 (9172); Savastano v. Nurnberg, ___ N.Y.2d ___ 1990 N.Y. Lexis 4460, Cal.No. 257 (dec

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10. (cont'd.)
waiver." United States v. Martin, supra, at 274; see People v. Fuller, 45 Misc.2d 303, 305 (Allegany Co. Ct. 1965).

Furthermore, the federal waiver process, under Fed. R.Crim.P. 23, is not directly comparable to the jury trial waiver as it occurs in New York State. Federal court defendants frequently are required to give advance waivers, and therefore do not know at the time they execute the waiver the identity of the trial judge (who may be all too familiar with the defendant). It is therefore desirable, observed the Court of Appeals for the Fourth Circuit in Wyatt v. United States, 591 F.2d 260, 265, n5 (4th Cir. 1979), that there be "some questioning by [the judge who approves the advance waiver] to ensure that proffered waiver will in fact be voluntarily and intelligently given."

12/27/90), slip opn. at 8. The courts have long recognized that "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel [and that] without it, though he be not guilty, [a defendant] faces the danger of conviction because he does not know how to establish his innocence." Powell v. Alabama, 287 U.S. 45, 68-69 (1932). It is principally because of the attendant risk that an uncounselled defendant will be subject to an unjust conviction that a trial judge must painstakingly explore with a defendant the pitfalls of his proceeding without counsel and must assess his comprehension of those dangers.

Because no comparable risks attend

the choice between a jury trial and a bench trial, the procedures for effecting a waiver of the jury trial right need not be so numerous nor so complex. Furthermore, "the guiding hand of counsel" (Powell, id, at 69) is present to assist the defendant with that choice and to explain to him the advantages and disadvantages of such a waiver.

Nor does appellant's comparison of the jury waiver to the waiver of a not-guilty plea -- and the consequent entry of a guilty plea -- withstand analysis. A decision to waive a jury trial is itself a neutral determination. The product of a tactical election, based upon one or more of the "many professionally sound reasons for

choosing bench trial over jury trial" (Wyatt v. United States, 591 F.2d 260, 266, n11 [4th Cir. 1979]), the decision itself is neither inherently favorable nor adverse to a defendant's interests. A plea of guilty, in contrast,

> is more than a confession which admits that the accused did various acts, it is itself a conviction; nothing remains but to give judgment and determine punishment.
>
> Boykin v. Alabama, 395 U.S. 238, 242 (1969)

A guilty plea represents, furthermore, the defendant's waiver of not only his state and federal constitutional rights to trial by jury but also the privilege against self-incrimination and the right to confront his accusers, waiver of which will not be presumed from a silent record.

Boykin, supra, at 243.

Moreover, even in the plea setting, there is no "uniform mandatory catechism of pleading defendants" (People v. Nixon, 21 N.Y.2d 338, 353 [1967]), and there must be something to "trigger the [court's] inquiry" into the purported defect in the plea. People v. Francis, 38 N.Y.2d 150, 154 (1975); see People v. Moore, 71 N.Y.2d 1002, 1005 (1988).

It has accordingly repeatedly been held in the jury waiver setting, as well as in the guilty plea context, that there must be something to alert the trial court to the purported insufficiency of the waiver. Absent such an indicator, there is no duty of inquiry on the part of the trial judge.

See People v. Duchin, supra, 12 N.Y.2d at 352-53; People v. Dominy, 116 A.D.2d 851 (3rd Dept.), Lv. den. 67 N.Y.2d 942 (1986); People v. Stroud, 143 A.D.2d 532 (4th Dept. 1988).

There being nothing in the record at bar to have alerted the trial judge that appellant did not comprehend precisely what he was doing, or even that he had any doubts about the tactical decision to be tried by a judge alone, his jury waiver was valid, and his conviction should therefore be affirmed.

POINT II

THE JURY WAIVER FORM AND COLLOQUY ON THEIR FACE SATISFYING ALL FIVE REQUIREMENTS OF CPL SECTION 320.10(2), APPELLANT MAY NOT RAISE ON DIRECT APPEAL A CLAIM THAT HIS JURY TRIAL WAIVER WAS INVALID.

Before the Appellate Division, appellant had asserted, in no uncertain terms,

> that the waiver in question was not "signed by the Defendant in person, in open court, in the presence of the court." In fact, it had been prepared and signed at some other point in time and was handed to the court as a fait accompli by the attorney for the Defendant. (A.R. 100)

Met by the People's argument that such a claim necessarily involves matter outside the trial record and, as such, may not be raised on direct appeal (A.R. 68), and by the Appellate Division's

endorsement of that position, 11 appellant contends in this Court that

> It was and is the Appellant's position, that the error complained is not dehors the record, but exists by the absence in the record of any effort on the part of the trial court to make a proper inquiry relative to the waiver of Appellant's constitutional right to a trial by jury. (App. Br. 29)

Whether appellant is now abandoning his previously unequivocally stated claim that the waiver wasn't signed "in open court in the presence of

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11. Any claim by defendant 'that his participation in the waiver was not knowing and voluntary implicates his relationship with his trial attorney and is to be proved, if at all, by facts outside the trial record in a proceeding maintainable under CPL 440.10 (People v. Johnson, supra [51 N.Y. 2d], at 988; see also, People v. Davidson, 136 A.D.2d 66).' People v. Magnano, 158 A.D.2d 979.

the court," his monumental shift of position avails him little. For if he is now maintaining -- despite his recitation in the signed "Waiver of Jury Trial" instrument that he fully understood all its ramifications -- that the waiver was unknowing and involuntary, proof of such a claim necessarily entails resort to facts outside the record regarding his intelligence and state of mind, and, as the Appellate Division observed, "his relationship with his trial attorney" (158 A.D.2d at 979). Furthermore, there are strong policy reasons for requiring that such extra-record claims be put forth in the form of "sworn allegations of fact essential to support the motion" (CPL Section 440.30 (3) [a]), for the

solemnity of the oath and the attendant risk of a perjury prosecution may, as Judge Breitel wrote in another context, "squelch the faker" (People v. Nixon, supra, 21 N.Y.2d 338, 355 [1967]).

This Court has held that a claim that a facially proper jury trial waiver was entered into unknowingly and involuntarily may be raised only on collateral Article 440 review, inasmuch as such a claim is dependent on extra-record facts "implicat[ing the defendant's] relationship with his trial attorney". People v. Johnson, 51 N.Y.2d 986, 988 (1980). The Court held, furthermore, that no objection having been timely voiced to the procedure surrounding the defendant's jury trial waiver, the issue had not been preserved

for appellate review. Id. at 987.

Appellant points to no decision, either pre-or post-Johnson, in which a defendant was relieved of the consequences of a jury trial waiver in setting comparable to that at bar. In fact, in the two most recent reported decisions on the issue, relief was denied on direct appeal and the defendant obtained whole or partial success via CPL Article 440.

In People v. Davidson, 123 A.D.2d 782 (2nd Dept. 1986), lv, den, 69 N.Y.2d 826 (1987), the Appellate Division held on direct appeal that the defendant had failed to preserve any issue regarding claimed defects in the waiver-approval procedure and, citing Johnson, supra, found that the record was inadequate to

review the waiver procedure. On collateral review, pursuant to CPL Section 440.10(1)(h), however, the defendant's conviction was vacated by the Appellate Division. People v. Davidson, 136 A.D.2d 66 (2nd Dept. 1988). As did the appellant herein (see A.R. 100), Davidson claimed that his waiver had not been executed in open court. Finding that the waiver form was "decidedly 'bare bones' in terms of its informative content" 12 and that the

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12. In contrast to the waiver form at bar, that in Davidson did not recite that it had been executed in open court, in the presence of the court. Furthermore, while making reference to Article I, Section 2 of the Constitution, the form contained no reference whatever to the Criminal Procedure Law. See, People v. Davidson, 136 A.D.2d at 67, n1.

trial minutes "made no reference to a jury waiver by either the court or the defendant's trial counsel," the Appellate Division found that

> there is lacking in the record evidence tending to establish that the jury waiver form was executed in "open court," nor is there anything in the record -- or the People's opposition papers -- which would permit us to conclude that the waiver of a fundamental right was "made knowingly and understandingly, based on an intelligent, informed judgment" [citations omitted].
>
> People v. Davidson, 136 A.D.2d at 70

Similarly, in People v. McDaniel, ___ A.D.2d ___, 555 N.Y.S.2d 498 (4th Dept. 1990), the defendant had asserted on direct appeal that his jury trial waiver had not been executed in "open court," as the Constitution and the CPL mandated. The Appellate Division,

citing Johnson, supra, and its decision in the instant case, ruled as follows:

> The validity of that contention cannot be determined on this record and must be established, "if at all, by the facts outside the trial record in a proceeding maintainable under CPL 440.10" [quoting with approval from People v. Johnson, supra].
>
> People v. McDaniel, 555 N.Y.S.2d at 498.

Having commenced an unsuccessful Article 440 proceeding in Supreme Court, the defendant McDaniel appealed to the Appellate Division by leave of a justice thereof. That Court observed that McDaniel's claim that the waiver form had never been presented to him in open court was supported by the record, which established that

the form had been executed at least 10 days before the start of the defendant's trial. The Appellate Division accordingly remitted the matter to Supreme Court for a hearing on the defendant's CPL Section 440.10 claim. People v. McDaniel, ___ A.D.2d ___, ___ N.Y.S.2d ___, 1990 N.Y. App. Div. Lexis 16466, #1479 (4th Dept. 12/21/90); but see People v. Watson, supra, 557 N.Y.S.2d at 30.

Johnson and its progeny should govern here. Appellant's jury trial waiver being, on its face, completely in accord with constitutional and statutory mandate, his remedy, if any, is to proceed in the trial court pursuant

to CPL Article 440. There being no defect in his conviction, it should be affirmed.

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE JUDGMENT OF CONVICTION APPEALED FROM SHOULD IN ALL RESPECTS BE AFFIRMED.

Respectfully submitted,

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COURT OF APPEALS OF THE STATE OF NEW YORK

----------X

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

MICHAEL MAGNANO,

Defendant-Appellant.

----------X

APPELLANT'S REPLY BRIEF

Respectfully submitted,

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PRELIMINARY STATEMENT

The Appellant, Michael Magnano, was convicted, after a bench trial in the County Court, County of Allegany on thirty-nine (39) counts of Medicaid Fraud. The Appellant then appealed that conviction to the Appellate Division, Fourth Department. The Appellate Division, Fourth Department, affirmed the conviction in People v. Magnano, 158 A.D.2d 979. Subsequent to the aforementioned affirmance of his conviction the Appellant made application before this Court for a leave to Appeal. Leave to Appeal was granted by Order of this Court dated June 5, 1990. The certified question posited to the Court on the application for leave was, "does the failure of a

trial court to make a proper inquiry on the record and ascertain that defendant's waiver of his right to a trial by jury is freely and voluntarily made render that waiver a nullity and constitute reversible error."

The Appellant filed his brief before this Court on or about October 1, 1990. The Respondent file his brief on or about January 25, 1991. The Appellant now addresses Respondent's brief in the instant reply brief.

POINT I. RESPONDENT'S HISTORICAL ARGUMENT IS WITHOUT MERIT

In Point 1a of Respondent's Brief, Respondent attempts to refute the Appellant's "historical argument." Appellant's historical argument is that this Court, in construing Article 1, Section 2 of the New York State Constitution, should look to the debate had in the Record of the New York State Constitutional Convention of 1938 to elicit the intent of the framers of the Amendment in question. It is Appellant's position that any such analysis will demonstrate that it was the intent of the framers to place on the trial court, the burden and the duty of insuring that the defendant's choice to waive a jury was properly made and

that the waiver of such a fundamental constitutional right must be voluntary and that it is a knowing and informed consent to waive such as is necessary for the waiver of any constitutional right. It is Appellant's further position that this burden is implicitly placed on the Court by the language utilized by the Legislature in the codification of the procedure for a proper waiver under C.P.L. 320.10(2) which mandates that the waiver must be "with the approval of the court."

It is submitted to this Court once again, that such an "approval of the Court" cannot be given in a vaccuum but can only be had as a result of a colloquy between the trial court and the person purporting to make the waiver so

that the Court may ascertain on the record that the waiver is indeed voluntarily and knowingly made as that term has been defined by both the United States Supreme Court, as well as this Court in construing the propriety of a waiver of a fundamental constitutional right.

It is essentially Respondent's position that, despite the clear and obvious intent of the framers of the Constitutional Amendment in question, the fact that subsequent to the passage of that Amendment the United States Supreme Court in Gideon v. Wainwright, 372 U.S. 335 (1963), mandated the States to provide counsel to indigent persons accused of a felony and that that mandate was codified by the New York

State Legislatures by law of 1965, Chapter 878, which under Article 18 of the County Law, sets forth a legislative scheme to provide both the mechanism and the financing for the appointment of counsel for indigent criminal defendants in the trial courts of the State, somehow negates the implicit burden imposed on the trial court by both Article 1, Section 2, of the New York State Constitution, as well as C.P.L. 320.10(2).

Respondent would have this Court rule that a trial court, in accepting such a waiver may rely on a defendant's counsel to perform that function. Clearly, such a holding would be inopposite to the intent of the framers of the Amendment. That intent, i.e., to

place the burden and the duty on the trial court, is exemplified by the fact that the Committee rejected the Weinfeld Amendment which suggested that consultation with counsel be mandated before the acceptance of such a waiver. It is suggested to this Court once again that Justice Sears' remarks

> "we thought that was sufficiently covered by requiring the approval of the Judge because we believe that you could rely upon the Judge the very court which had jurisdiction to try the case, to see that defendant was well advised..." Record of Constitutional Convention, page 1276-77.

demonstrates the intent of the framers of the amendment to place the burden foresquare on the shoulders of the trial court accepting the waiver.

It is further submitted to this

Court, that Respondent's attempt to somehow argue that the Constitutional Amendment was adapted in its present form can be attributed to the fact that the Supreme Court had not yet decided Gideon v. Wainwright, supra, is undermined by his own statement that:

> "Furthermore, while "'[t]here has been no time in the governmental history of this state when the court lacked the power to assign counsel for the defense of indigent persons charged with crime'" (People v. Price, 262 N.Y. 410, 412 (1933) [quoting with approval from People ex rel. Saunders v. Bd. of Supervisors, 1 Sheld. 517 [Buffalo City Ct. 1875]), it was not until 1965 that the Legislature devised a mechanism for providing legal representation to all indigents charged with a crime (L. 1965, ch. 878). See, generally, Belge v. State of New York, 52 Misc.2d 646, 647 (Ct. Claims 1967)." Respondent's Brief, pg. 12-13.

It cannot be argued that the

members of the Constitutional Committee were unaware that:

> "there has been no time in the governmental history of this State when the court lacked the power to assign counsel for the defense of indigent persons charged with crimes." People v. Price, 262 N.Y.2d 410, 412 (1933).

and that despite that knowledge they still felt compelled to place the burden and duty on the trial court with no provision whatsoever "for either consultation with or reliance on trial counsel." Again, when the Legislature passed C.P.L. 320.12(2) codifying the procedure for accepting such a waiver, the Legislature again clearly made no provision either for consultation with or reliance on trial counsel in mandating the manner in which such a waiver must be made and accepted by the

trial court.

In short, it is submitted that Respondent refutes his own argument in this regard. The fact that right to counsel cases mandate defendant be represented by counsel in no way relieves the trial court of its obligation to make a proper inquiry on the record to ascertain the propriety of accepting the waiver. It is submitted that the trial court cannot avoid this burden as suggested by Respondent by relying on defense counsel.

POINT II. RESPONDENT'S ARGUMENT RELATIVE TO THE SUFFICIENCY OF THE WAIVER IS WITHOUT MERIT

In Point Ib of Respondent's Reply Brief, the Respondent argues that what he characterizes as "the jury waiver

colloquy" was appropriate to the circumstances of this case. Again, in support of his argument, Respondent's sets forth his position that in some fashion counsel has a central role. And after arguing that the second sentence of subdivision 2 of C.P.L. 320.10 restricts the trial court's discretion comes again to the conclusion that the fact that the Appellant was represented by trial counsel in some way negates the trial court's clear constitutional obligation to make inquiry. As Appellant has consistently pointed out, there is no possible way that the Court can make a waiver determination without conducting a colloquy with the defendant. As noted what the Respondent chooses to characterize as "the jury

waiver colloquy" was, in fact, no colloquy at all. Again it is submitted to this Court that the trial court made no effort whatsoever to ascertain that the waiver in question was made freely, knowingly and voluntarily.

Respondent then goes on at great length to demonstrate that a trial court's denial of the defendant's constitutional right to waive a jury trial is closely scrutinized by the appellate courts. He states quite correctly, that it is well within the trial court's discretion to refuse to accept a waiver when, in the court's judgment, the waiver is offered to gain an "impermissible procedural advantage." Again it is submitted that although this particular issue is not before this

Court at present, the trial court cannot make this judgment without in some fashion making a proper inquiry so as to determine the basis for the proffered waiver.

The Respondent further concedes that:

> "While the court possesses somewhat greater discretion to disapprove a jury trial waiver on the basis that the defendant is not fully cognizant of the consequences of his choice, the breadth of that discretion will vary with the defendant who is before the court: the scope of a trial judge's explanation and inquiry regarding a proposed jury waiver is necessarily proportionate to the defendant's need for such guidance from the court." Respondent's Brief, pg.16.

Respondent then points out case situations in which the Appellate Courts have held that the trial court's inquiry

may be less extensive when the defendant is familiar with the criminal justice system, is a business man, and is represented by experienced counsel. Respondent then would have this Court draw the illogical conclusion that in the matter at bar, "the trial judge cannot be faulted for having made only a prefunctory inquiry into the waiver's voluntariness." Specifically, in the matter at bar such a conclusion begs the question. The question is, does the Constitution as well as C.P.L. 320.10, mandate that the Court make inquiry and hold a colloquy with the defendant so that the trial court's acceptance or denial of the waiver has a reviewable basis in the record. Again, it is submitted to this Court that the answer

to that question must be in the affirmative.

Respondent further faults the Appellant for not positing specific questions which the court should have asked the Defendant upon conducting a proper colloquy with the Appellant. It is submitted to this Court that Appellant's reluctance to presume to set forth a strict catechism of questions which he would have this Court impose on a trial court as a rule, is based in the first instance in a proper defference to this Court's long standing rule that this Court itself would not impose a strict catechism to be followed by a trial court in analogous situations such as the allocution to be had on taking a guilty plea, People v. Nixon, 21 N.Y.2d

338 (1967). In the second instance, Appellant would prefer to rely on a common sense approach to the implementation of the plain mandate of both the Constitution and C.P.L. 330. Such a common sense application would surely lead a trial court to inquire, as on the acceptance of a guilty plea, as to whether the person proffering the plea was under the influence of drugs or alcohol, suffering from a physical or mental impairment which would cloud his judgment and whether or not that person had a true awareness of the implications of the waiver of his fundamental constitutional right to a trial by jury.

Lastly, in a footnote on page 17, Respondent belittles the Appellant's argument that an analogy can and should

be drawn between a waiver under the State Constitution and the practice in the Federal Courts in accepting a waiver under the Federal Constitution. Respondent's argument in this regard that the authorities relied upon by the Appellant are all predicated upon the supervisory powers of the Circuit Courts over the District Courts, does not take into consideration that this Court itself has historically adopted a "supervisory role" over all the Appellate and lower courts of this State.

In sum, it is again most respectfully submitted to this Court, that notwithstanding Respondent's argument to the contrary, this Court should hold that there is a clear

mandate, implicit in both Article 1, Section 2, as well as the codification of the procedures to be followed in C.P.L. 320, that a trial court make a proper inquiry of the defendant who is proffering a waiver of his constitutional right to a jury trial so that the court's decision to accept or reject that waiver may be based on a proper foundation that is reflected in the trial record.

POINT III. THE INSTANT APPEAL IS PROPERLY BEFORE THIS COURT

It is most respectfully submitted to this Court that despite Respondent's assertions to the contrary, the instant Appeal is properly before this Court.

In Point II of his Reply Brief, Respondent asserts that it is his position that the jury waiver presented to the prior Court in the instant matter met the requirements of C.P.L. 320.10(2). Respondent begins his argument in this regard by pointing out that the Appellant argued in the Appellate Division:

> "that the waiver in question was not signed by the Defendant in person, in open court, in the presence of the court. In fact, it had been prepared and signed at some other point in time and was handed to the court as a fait accompli by the attorney for the Defendant." Respondent's Brief, pg. 20.

Respondent then reasserts his argument that such a claim necessarily involves matter outside the trial record and as such may not be raised on direct appeal. It was and still is the

Appellant's position that the record does not reflect that the waiver in question was, in fact, signed:

> "...such waiver (1) must be in writing and (2) must be signed by the defendant (3) in open court (4) in the presence of the court..." (C.P.L. 320.10(2))

Appellant's present position that the absence in the record of anything to indicate that the waiver form was, in fact, properly signed before the Court, coupled with the absence in the record of any colloquy by the Court to properly ascertain that the waiver in question was being made knowingly, willingly and voluntarily in accordance with the duty imposed on the trial court by the mandate of both Article 2, Section 2 of the New York State Constitution as well as the mandate implicit in the language

of C.P.L. 320.10(2), does not constitute any shift whatsoever of the Appellant's position let alone a "monumental shift" as characterized by the Respondent.

The Respondent attempts to support his premise that the instant Appeal is not properly before this Court and that the Appellant should be relegated to a C.P.L. 440 motion, by citing to and relying on this Court's decision in People v. Johnson, 51 N.Y.2d 986 and its progeny. This reliance is misplaced. It is most respectfully submitted that the factual situation in the matter at bar is clearly distinguishable from that present in People v. Johnson, supra, People v. Davidson, 136 A.D. 66. In both of these matters, the issues raised by the Appellant clearly concerned facts

relative to those defendants relationships with their attorneys which factual matters could not be determined by an examination of the trial record and were, therefore, properly the subject of a C.P.L. 440 motion. Similarly, in the matter of People v. McDaniel, ___ A.D.2d ___, 555 N.Y.S.2d 498, and People v. McDaniel, ___ A.D.2d ___, ___ N.Y.S.2d ___, (4th Dept. 1990), is clearly distinguishable and is not dispositive of the issue at bar. In McDaniel, supra, the defendant-appellant, initially asserted on direct appeal that his jury trial waiver had not been executed in open court. The defendant-appellant in that matter, unlike the appellant in the issue at bar, did not raise the question of the

propriety of the trial court's failure to comply with the mandates of Article 1, Section 2 of the New York State Constitution and C.P.L. 320.10(2). The Appellate Division, Fourth Department, initially relegated McDaniel, supra, to seeking relief by means of C.P.L. 440. Defendant, McDaniel proceeded unsuccessfully to seek relief in that manner and the motion was denied. On appeal to the Appellate Division by permission from the denial of his C.P.L. 440 motion, the Appellate Division then determined that the trial record did, in fact, support the Appellant's original contention that the waiver form had been executed at least ten (10) days before the start of the defendant's trial. The Appellate Division then remanded the

matter to Supreme Court for a further hearing on the defendant's C.P.L. 440 claim, ___ A.D.2d ___, ___ N.Y.S.2d ____. Clearly, McDaniel, supra, is not analogous to the matter at bar.

It is interesting to note that Respondent also urges as authority, People v. Watson, ___ A.D.2d ___, 557 N.Y.S.2d 29 (1st Dept. 1990). In that matter, unlike the matter at bar, the Appellate Division, First Department, in rejecting the Appellant's claim, on direct appeal that the jury waiver did not comply with the statutory requirements of C.P.L. 320.10(2), stated:

> "We also reject defendant's claim that his jury waiver, pursuant to C.P.L. 320.10(2), did not comply with the statutory requirements. The record fully supports the

> view that defendant's waiver was knowingly, intelligently and voluntarily made. There is no requirement of a uniform mandatory catechism as a prerequisite to reach such a conclusion, just as one is not required in determining the propriety of entry of a guilty plea. (People v. Nixon, 21 N.Y.2d 338, 353, 287 N.Y.S.2d 659, 234 N.E.2d 687.) Furthermore, given defendant's familiarity with the criminal justice system, the fact that he was represented by counsel and that relevant inquiry was made of him by the court, we are satisfied that the waiver was knowingly and voluntarily made. (People v. McQueen, 52 N.Y.2d 1025, 438 N.Y.S.2d 299, 420 N.E.2d 97.)" 557 N.Y.S.2d 29. (Emphasis supplied)

It is submitted that although the specifics of the inquiry made by the trail court in Watson, **supra**, are not reflected in the Appellate Division's decision in that matter, it is apparent that a proper inquiry was, in fact, held by the trial court in that matter. It

is submitted that the Appellate Division, First Department's holding in Watson, supra, specifically supports the Appellant's position in the instant matter that the trial court is mandated to make an inquiry on the record relative to the circumstances surrounding the purported waiver.

In toto, the Respondent in his argument chooses to misconstrue the Appellant's position before this Court and based on his own argument would have this Court, disregard the question certified before it, and reach the unwarranted conclusion that the instant Appeal is not properly before this Court and that the Appellant should be relegated to seeking relief by way of C.P.L. 440 motion. It is most

respectfully submitted that Respondent's argument and his unwarranted conclusion are without merit. Either an appropriate colloquy is required to waive a jury trial or it is not. C.P.L. 440 is not implicated in this determination.

It is most respectfully submitted, at the risk of redundancy, that the Appellant's Appeal is properly before this Court. Leave to appeal to this Court was sought by the Appellant on the grounds that the complaint is so fundamental that it did, in fact, affect the organization of the Court and/or the mode of pleadings prescribed by law. The specific question posited to the court was on the application for leave was:

> "Does the failure of a trial court to make a proper inquiry on the record and ascertain that a defendant's waiver of his right to a trial by jury is freely and voluntarily made, render that waiver a nullity and constitute reversible error."

That question was certified and leave to appeal was granted by the Court.

Respondent additionally would have this Court refuse to consider the question, despite the fact that the Court has already certified the question, on the grounds that no objection was raised at the trial level and, therefore, the error has not been preserved for consideration either on direct appeal to the Appellate Division, or in this Court. Respondent's position in this regard is without merit. It is most respectfully submitted that this

Court may review on Appeal errors of the trial court, even though the point was not raised by objection when the error is of that nature claimed by the Appellant. Although ample authority for this position has previously been supplied to this Court by the Appellant, this Court's attention is most respectfully drawn to the language utilized by the commentor in Powers of the New York Court of Appeals, Cohen and Karger, revised ed., where it was stated thus:

> "There are, however, exceptional situations in which claimed errors of the trial court may be reviewed on appeal even though the point was not raised by objection in the trial court. The underlying principle was announced in the early case of People v. Bradner:
>
> If the record discloses upon its face that the court had no

jurisdiction, or that the constitutional method of trial by jury was disregarded . . ., or some other defect in the proceedings, which could not be waived or cured and is fundamental, it would, as we conceive, be the duty of an appellate tribunal to reverse the proceedings and conviction, although the question had not been formally raised in the court below, and was not presented by any ruling or exception on the trial.

In accordance with that reasoning, the Court of Appeals has reviewed on appeal, though the point was not formally raised in the trial court, such questions as the denial of an adequate opportunity to the defendant to prepare for trial with the assistance of counsel of his own choice, the failure of the trial judge to charge the jury, the failure of the prosecuting attorney to make an opening statement to the jury, the failure of the court to ask the defendant before imposing sentence whether he had any legal cause to show why judgment should not be pronounced against him, and the power of the trial court to amend the indictment by adding a new count." (footnotes

omitted) Cohen & Karger, revised ed., pg. 750-751, section 199.

It is submitted that, as exemplified by the language in Cohen and Karger, **supra**, and the authorities relied upon therein, as well as the authority furnished to this Court previously and relied upon by the Appellant, that the question at bar is properly before this Court.

In sum, it is most respectfully submitted that the Respondent's argument in this regard is without merit, should be disregarded by this Court, and this Court should hold that the instant Appeal is properly before it.

CONCLUSION

It is most respectfully urged that this Court should hold that the arguments posited in Respondent's Brief are without merit, the certified question should be answered in the affirmative and that the trial court having failed to perform the duty imposed on it by Article 1, Section 2 of the New York State Constitution and C.P.L. 320.10(2), the Appellant's conviction must be reversed.

Respectfully submitted,

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